IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Omaha National Bank petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered February 3, 1976.

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OPINIONS BELOW

The opinion of the Court of Appeals en banc, printed in Appendix A to this petition (*infra,* pp. 38a-62a), is

unreported. The opinion of the three-judge panel of the Court of Appeals (App. A, *infra,* pp. 28a-37a), is also unreported. The opinion of the district court (App. A, *infra,* pp. 19a-27a), is likewise unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1976 (App. A, p. 38a).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

The statutes involved are 12 U. S. C. § 36 (c) and 36 (f) and Section 8-157, Nebraska Revised Statutes (1975 Supplement). They are printed in Appendix B, *infra,* pp. 1b-3b. The regulation involved is Nebraska Department of Banking Reg. § 8-157-01 (1970), which is printed in Appendix B, *infra,* p. 4b.

QUESTIONS PRESENTED

1. Whether an irreconcilable conflict in principle exists between the decisions of the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit, which reached opposite conclusions, on

indistinguishable facts, on the question of whether a drive-in facility of a national bank was a branch bank, as defined by 12 U. S. C. § 36.

2. Whether the decision of the Court of Appeals is in conflict with this Court's decision in *First National Bank v. Dickinson,* 396 U. S. 122 (1969), by virtue of the fact that the Court of Appeals assigned an "indispensable role" to state law in determining whether or not Petitioner's drive-in facility is a branch bank within the meaning of 12 U. S. C. § 36.

3. Whether the decision of the Court of Appeals is in conflict with this Court's decision in *First National Bank v. Walker Bank & Trust Company,* 385 U. S. 252 (1966), by virtue of the fact that the Court of Appeals relied upon the doctrine of "competitive equality" in determining whether or not Petitioner's drive-in facility was a branch bank.

STATEMENT OF THE CASE

Petitioner, The Omaha National Bank (hereafter "Omaha National") is a national banking association having its main banking offices in the Woodmen Tower building in downtown Omaha, Nebraska. The dispute in this case involves Omaha National's walk-in/drive-in facility located across the street from the main bank. A diagram showing the relative location of the two facilities appears at Figure 1 of this petition (*infra,* p. 5).

In July, 1973, Omaha National applied to the Regional Administrator of National Banks, Tenth Region,

for permission to move its existing drive-in facility, in the Brandeis Parking Garage, to the southwest corner of 18th and Douglas Streets, one block to the west (Fig. 1, *infra*). The relocation was necessitated by the fact that the Brandeis facility had become inadequate to accommodate steadily increasing customer usage, posed health hazards for both customers and bank employees working there, and created traffic jams on adjoining public streets. The Brandeis facility could not be redesigned or renovated in such a way as to remedy these conditions.

Omaha National selected the 18th and Douglas location because it was the nearest site to the main bank which was reasonably available. All sites closer to the main bank were unavailable, or were available only at prohibitive cost.

The relocation of its drive-in was the final step in the modernization and expansion of Omaha National's main banking facilities. Prior to 1970 its main bank was located in the Omaha Building (Fig. 1), and its walk-in/drive-in in the Brandeis Parking Garage. In 1970, Omaha National moved its main bank from the Omaha Building to Woodmen Tower, in which it occupies all of the ground level except the public lobby (in which it has a night depository), the entire level below ground level, and the entirety of the first three floors above ground level. Omaha National has never had drive-in facilities in the Woodmen Tower building itself.

The net effect of Omaha National's modernization and enlargement of its main bank facilities merely has been to move them one block west in downtown Omaha. Prior to 1970, its main bank in the Omaha Building was in

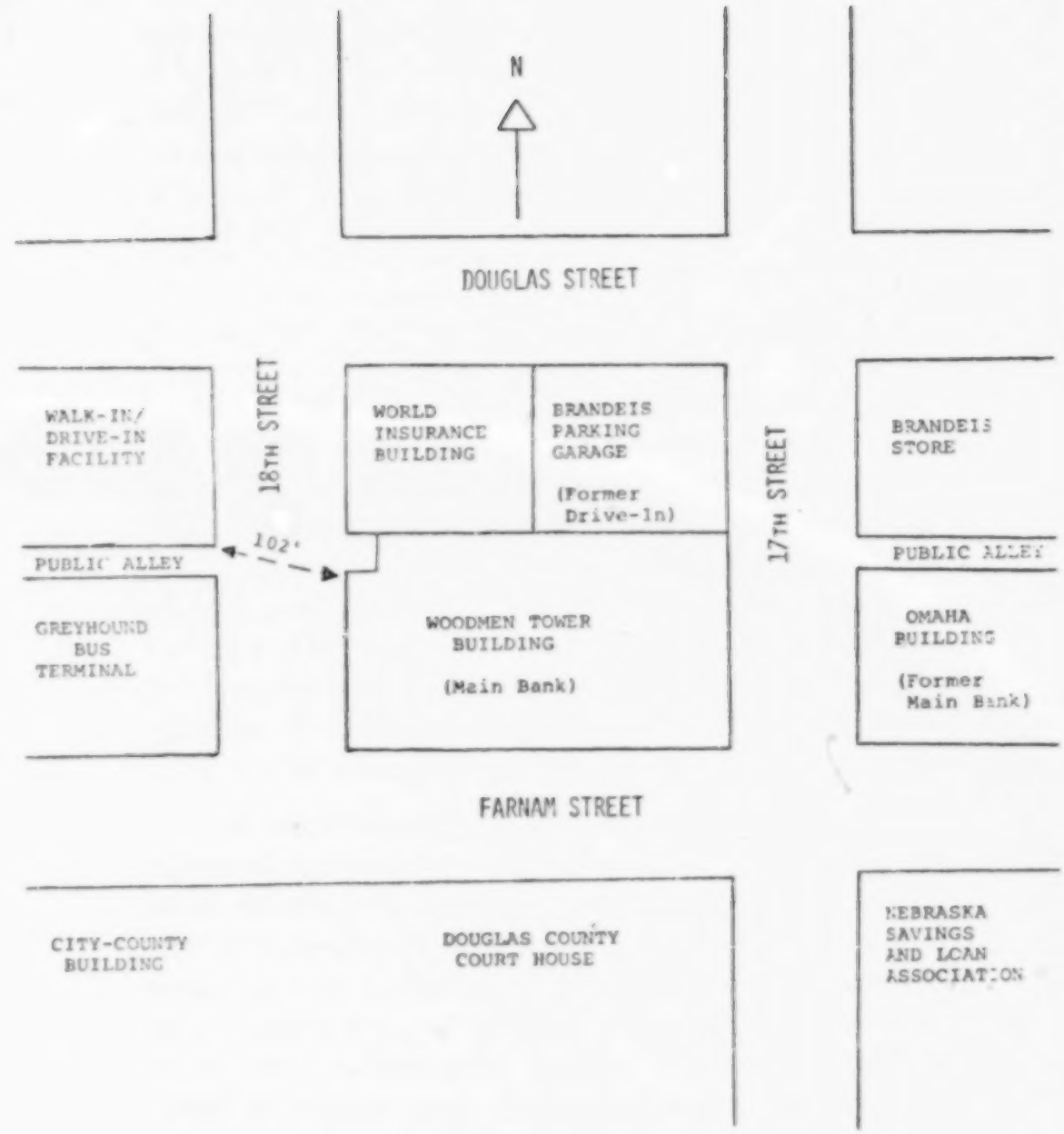

FIGURE 1 *

* ALL INFORMATION SHOWN IN FIGURE 1 IS EVIDENCE, UNDISPUTED, IN THE THE DISTRICT COURT TRANSCRIPT AND EXHIBITS. NOT TO SCALE.

exactly the same geographical relationship to its Brandeis facility as its main bank in Woodmen Tower now is to its 18th and Douglas facility (Fig. 1). Neither Respondents nor the Nebraska Department of Banking nor any other party ever claimed that the Brandeis facility was a branch of the main bank when the latter was located in the Omaha Building.

The Regional Administrator concluded that the proposed 18th and Douglas location would "constitute an integral part of the main bank office operation", for which no certification was required. Accordingly, Omaha National commenced construction of the new facility in September of 1973. Ten weeks later, after Omaha National had committed more than $450,000 to the project, Respondents commenced this action in state court, alleging that the new facility would be a branch bank, and that Omaha National would then have one more branch than permitted by Nebraska law. Respondents obtained an *ex parte* restraining order from the state court.

Pursuant to 28 U.S.C. § 1441, Omaha National removed the case to district court. The district court dissolved the state court restraining order. At the same time, the district court, noting that the Regional Administrator's determination had been reached after *ex parte* proceedings, directed the Comptroller of the Currency of the United States (hereafter "Comptroller") to review the Regional Administrator's determination in an adversary proceeding (App. A, pp. 7a-8a).

After receiving written submissions from the parties, the Comptroller reaffirmed the Regional Administrator's determination that the 18th & Douglas facility

was an integral part of the main bank, and not a branch App. A, pp. 9a-17a).

The district court then proceeded to trial of the case, making it clear that the proceedings before it were a full trial on the merits, and not merely a review of the Comptroller's determination (App. A, p. 27). At the conclusion of trial and after submission of written arguments by the parties, the district court found that the 18th & Douglas facility was "an integrated extension of the main bank, and that such facility is not a branch bank under federal law", and dismissed the action with prejudice (App. A, p. 18a).

Respondents appealed. After submission of briefs and oral argument, a three-judge panel of the Court of Appeals, Chief Judge Gibson dissenting, affirmed the decision of the district court (App. A, pp. 28a-36a).

The Court of Appeals granted Respondents' petition for rehearing en banc, and, after oral argument, issued its en banc decision reversing the judgment of the district court, and remanding the case for entry of a judgment "providing appropriate injunctive relief consistent with this opinion." Chief Judge Gibson wrote the majority opinion (App. A, pp. 38a-54a). Judge Lay wrote a concurring opinion (App. A, pp. 54a-56a). Judge Webster wrote the dissenting opinion, in which Judge Henley joined (App. A, pp. 56a-62a).

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REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals is in conflict with the decision of the Fourth Circuit Court of Appeals in the Farmers & Merchants case, in which this Court has recently denied certiorari.

The decision of the Court of Appeals in this case is squarely and irreconcilably in conflict with the decision of the Court of Appeals for the Fourth Circuit in the case of *Commonwealth of Virginia v. Farmers & Merchants National Bank*, 480 F. Supp. 568 (W. D. Va. 1974), *aff'd per curiam*, 515 F. 2d 154 (4th Cir. 1975), *cert. denied*, 44 U. S. L. W. 3205 (U. S. Oct. 6, 1975). Both decisions address the same issue, namely whether the drive-in facility in question was or was not a branch of an existing national bank facility.

The two courts are in substantial agreement as to the factual considerations which govern the determination of whether a given national bank facility is a branch.[1] These considerations have been systematically developed in a series of decisions of lower federal courts.[2] As

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1 In fact, the Court of Appeals cites the Farmers & Merchants case in making its own enumeration of these factors. App. A, p. 47a, fn 4.

2 These cases include: Jackson v. First National Bank of Valdosta 246 F. Supp. 134 (D. Ga. 1965); Dunn v. First National Bank of Cartersville, 345 F. Supp. 853 (D. Ga. 1972); North Davis Bank v. First National Bank of Layton, 457 F. 2d 820 (10th Cir. 1972); Driscoll v. Northwestern National Bank of St. Paul, 349 F. Supp.

(Continued on next page)

enumerated by the Court of Appeals in this case, they are:

(1) *The distance separating the main bank from the added facility.* Measured in a straight line from the main bank building to the facility, the distance in this case is 102 feet;[3] in the *Farmers & Merchants* case it was 204 feet.[4]

(2) *The presence or absence of intervening structures.* In this case there are none: only a "moderately traveled truncated" public street intervenes;[5] in the *Farmers & Merchants* case, "at least one public street" and "other property not owned by the bank" intervened.[6]

(3) *Physical connection, if any, between the main bank and the facility.* In this case, the facility is connected to the main bank by a pneumatic tube system;[7] in the *Farmers & Merchants* case there was no connection.[8]

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245 (D. Minn. 1972), rev'd, 484 F. 2d 173 (8th Cir. 1973); State Chartered Banks in Washington v. Peoples National Bank of Washington, 291 F. Supp. 180 (D. Wash. 1966); Michigan National Bank v. Saxon, Unreported, Civ. No. 821-862 (D. D. C. 1962).

3 Respondents' argument for a more circuitous measure of distance was correctly rejected by the district court. App. A, p. 22a.

4 515 F. 2d 154.

5 App. A, p. 22a.

6 515 F. 2d 154.

7 App. A, p. 22a.

8 380 F. Supp. 575.

(4) *The effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers).* In each case, the district court found the facility in question had no material effect on the balance of competition.[9]

(5) *The availability of other locations for the attached expansion.* In each case, the district court found that no location closer to the existing bank was reasonably available as a site for the facility in question.[10]

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9 The district court in this case found:

> "The 18th & Douglas facility did not expand in a material way customer access in a geographical area not previously served, nor is the facility so situated physically as to give The Omaha National Bank a material competitive advantage in securing customers. Only customer convenience and the safety of the customer and local traffic, both pedestrian and automobile, have been affected. The customer must still walk or drive to approximately the same area." App. A, pp. 25a-26a.

The district court in the Farmers & Merchants case made a similar finding. 380 F. Supp. 574.

The Court of Appeals in this case stated:

> "The question in this case is not whether Omaha National acted reasonably or prudently in a business sense in moving the service of its previous attached Brandeis drive-in facility to 18th and Douglas or whether doing so in lieu of other alternatives was least unsettling to the balance of competition, but simply whether the facility constitutes a federally defined 'branch' carrying Omaha National beyond the limits of branching permitted state banks." App. A, pp. 52a-53a.

10 App. A, p. 24a; 380 F. Supp. 573. The Court of Appeals in this case held that this consideration was irrelevant. Supra, footnote 9.

(6) *The dependence of the facility upon the main bank in day-to-day banking operations.* This criterion has not been previously enumerated explicitly by a federal court. The district court in this case found that the "contested facility was an adjunct or annex to the existing main bank" and that "the functioning of this facility evinces its inherent characteristics of a dependent auxiliary teller office,"[11] and the Court of Appeals made no contrary finding. There was no discussion of this criterion in the *Farmers & Merchants* case.

Correctly perceiving that there was no judiciable factual distinction between the two cases, the Court of Appeals in this case attempted to distinguish the two cases on the basis of differences in the branch banking laws of the states of Nebraska and Virginia. That it is an error of law to refer to state branch banking law in this context, in view of this Court's holding in the *Dickinson* case,[12] is discussed in another part of this petition.[13]

But even laying this error aside, the Court of Appeals' attempted distinction will not stand scrutiny. It stated:

> ". . . Whereas in *Farmers & Merchants* the district court only *assumed* that state law definitions of 'branch' were flexible enough to accommodate the unattached drive-in expansion as part of a state bank's existing branch (despite prior state administrative rulings apparently to the contrary), in the instant

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11 App. A, pp. 24a-25a. The district court in the Farmers & Merchants case made a similar finding. 380 F. Supp. 573.

12 First National Bank in Plant City, Florida v. Dickinson, 396 U. S. 122 (1969).

13 Infra, pp. 12-16.

> case it is *clear* that Nebraska law would not permit a state bank to do what Omaha National is attempting." (App. A, p. 47a. fn 4.)

No such assumption is expressed or implied in the Virginia case. The fact that the Virginia action was brought by the state agency having supervision of state banks, after notifying Farmers & Merchants Bank that "the drive-in facility could not be legally operated under the branch banking laws of Virginia,"[14] totally negates the existence of such an assumption.

There is, therefore, no legitimate basis upon which this case can be distinguished on its facts from the *Farmers & Merchants* case. Even the Court of Appeals' erroneous attempt to distinguish the cases on the basis of differences in the branch banking laws of Nebraska and Virginia falls short. The governing law, namely 12 U. S. C. § 36, is the same in each case. The decisions of the Eighth and Fourth Circuit Courts of Appeals are directly in conflict. A solid ground for granting certiorari clearly exists.

II.

Because it assigns state law and regulations an "indispensable role" in determining whether a facility of a national bank is a branch, the decision of the Court of Appeals is in conflict with this Court's decision in the Dickinson case.

The fundamental error of law which pervades the majority opinion of the Court of Appeals is that it has

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14 380 F. Supp. 570-571.

not followed the clear mandate of this Court in *First National Bank v. Dickinson,*[15] which requires that the threshold question of whether a facility of a national bank is a branch must be decided under federal law, and not state law.

In the *Dickinson* case, Chief Justice Burger, speaking for the Court, said:

> "We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes 'branch banking' must control the content of the federal definition of § 36 (f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated . . . for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of 'branch'." 396 U. S. 133-34.

The Court of Appeals' error is apparent from a reading of the majority opinion as a whole. It is epitomized by the following quotation from that opinion:

> "[I]n the instant case Omaha National, the Comptroller and the District Court have . . . disregarded the *indispensable role* state law must play in applying the federal definition of 'branch' . . . ." App. A, p. 49a. (Emphasis added.)[16]

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15 First National Bank v. Dickinson, 396 U. S. 122 (1969).

16 Subsequent to the decision of the Court of Appeals in this case, the Nebraska Legislature amended the state's branch banking law in a manner intended to classify a facility such as the one here in dispute as an "attached auxiliary teller office". By Petitioner's

(Continued on next page)

Chief Justice Burger's observation in the *Dickinson* case is equally apropos in this case:

> "On this point the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law . . . ." 396 U. S. 134.

Three judges of the Court of Appeals recognized the error of the majority opinion. In the dissenting opinion, Judge Webster, joined by Judge Henley, stated:

> "Our holding today undercuts *First National Bank v. Dickinson* . . . by assigning to state law an 'indispensable role' in the determination of what is a 'branch' of a national bank. . . . Judge Lay, in his separate concurring opinion, shares my view that the definition of a branch bank is solely a question of federal law and that state law is irrelevant to this issue. . . .
>
> ". . .
>
> "If, as the majority opinion seems to imply, the existence of a state statute or regulation, limiting or prohibiting certain types of activities may operate to pre-empt the determination by a federal court of whether a specific facility is or is not a branch, then the established rule that branch banks are defined under federal law is mere lip service. I cannot accept such a circular result.
>
> ". . .
>
> "The Supreme Court has made it abundantly clear that while a state may limit or prohibit branch banking within its borders it has no role to play in

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theory of this case, this amendment of state law is irrelevant. The amendment does not become effective until 90 days after adjournment of the Legislature. As of March 25, 1976, the Legislature was still in session.

> determining what is or is not a 'branch' of a national bank . . .'' App. A, pp. 56a-59a.

Similarly, Judge Lay, in his concurring opinion, identified the majority's error:

> ". . . I cannot accept the rationale offered by the majority. The opinion in my judgment misconstrues the deference due state law under the policy of competitive equality and thereby justifies use of state law to define a federal branch bank. This allows the 'tail to wag the dog.' The definition of a 'branch' bank is solely a question of federal law." App. A, p. 54a.

The majority's erroneous application of the foregoing principle enunciated in the *Dickinson* case completely accounts for the conflict between its decision and the decision of the Fourth Circuit Court of Appeals in the *Farmers & Merchants* case, *supra*.[17]

While dispositive of the case at bar by virtue of its principle of law discussed above, the *Dickinson* case is readily distinguished from this case on its facts, and is not a precedent for the decision of the Court of Appeals. Whereas the disputed facility in the case at bar is immovable and is located only 102 feet from the main bank,[18] the facilities found to be illegal branching activity in the *Dickinson* case were a deposit receptacle located one mile from the main bank, and an armored car

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17 As the majority acknowledges:

> "[I]n our view the Farmers & Merchants decision impermissibly . . . underrated the influence of state law definitions of branching in favor of administrative fiat and judicially conceived criteria recited in the cases. To the extent the Farmers & Merchants court did so, we decline to follow it." App. A, p. 48a, fn. 4.

18 Fig. I, supra, p. 5.

teller service which ranged throughout the bank's trade area.[19]

The Court of Appeals has failed to follow this Court's holding in the *Dickinson* case, that the threshold question of whether a national bank facility is a branch is to be determined under federal law, not state law. A writ of certiorari should be granted to rectify its error.

III.

Because it invokes the doctrine of "competitive equality" to determine whether a facility of a national bank is a branch, the decision of the Court of Appeals is in conflict with this Court's decision in the Walker Bank case.

Throughout the majority opinion, the Court of Appeals relies upon the doctrine of "competitive equality" to justify its resort to state law to determine whether or not the facility in question is a branch bank. By doing so, the majority reveals an entire lack of understanding of the proper application of that doctrine, as announced by this Court in the *Walker Bank* case.[20]

Properly understood, the doctrine of competitive equality has no application whatever to the determination of whether a facility of a national bank is or is not a branch. This is evident from the *Walker Bank* case itself, in which it was understood from the outset that the facilities there in question were branch banks. The issue

19 396 U. S. 128.

20 First National Bank of Logan, Utah v. Walker Bank & Trust Company, 385 U. S. 252 (1966).

in the *Walker Bank* was not *whether* any of the facilities in question was a branch; the issue was whether any of the branches in question was a *permissible branch.*[21]

Any possible doubt about the proper application of the doctrine of competitive equality was removed by this Court in the *Dickinson* case, where Chief Justice Burger stated:

> "Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, Walker Bank, supra, for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of 'branch.'" *First National Bank v. Dickinson,* 396 U. S. 122, 133-34.

The error of the Court of Appeals in the case at bar is evident from the following quotation from the majority opinion:

> **"While the language [of 12 U. S. C. § 36 (c)] is somewhat ambiguous concerning the extent to which state law should be used to *define* branch banking, the Supreme Court's recognition of Congress' paramount policy of fostering competitive equality in the McFadden Act mandates that, in determining whether a national bank facility is a branch, prime consideration must be given to whether a state bank would be allowed to maintain one like it in the circumstances." App. A, pp. 46a-47a.**

Judges Webster and Henley correctly perceived the majority's erroneous application of the doctrine of com-

21 Id.

petitive equality. In the dissenting opinion, Judge Webster stated:

> "Once a facility of a national bank has been determined to be a 'branch' under federal law, then state law may govern the 'how, where and when' of its operation. That is the extent of competitive equality. When Congress undertook to include a general definition of 'branch' in the McFadden Act, it could hardly have intended that the definition should have one meaning in Nebraska and another meaning in Virginia. State law is, therefore, irrelevant in the determination of what is or is not a 'branch' of a national bank." (Footnote omitted.) App. A, p. 62a.
>
> ". . .
>
> "Competitive equality does not mean that there will not be some differences from time to time between what is or is not a 'branch' as determined under federal law and what a particular state considers a branch to be. Such differences are inevitable in a federal system. The federal standards were applied in this case and the facility was determined not to be a branch. There was substantial evidence to support the District Court's finding that '[t]he 18th & Douglas facility did not expand in a material way customer access in a geographical area not previously served,' and that the facility was not so situated physically 'as to give the Omaha National Bank a material competitive advantage in securing customers.' " App. A, p. 62a.

The majority's failure to follow the rule of the *Dickinson* case, *supra*,[22] that whether a facility of a national bank is or is not a branch is to be decided under federal law, was induced, at least in part, by its misapplication of the doctrine of competitive equality as pronounced in

22 First National Bank v. Dickinson, 396 U. S. 122 (1969).

the *Walker Bank* case. This Court should grant certiorari to correct these errors before they are further compounded by other federal courts.

IV.

The decision of the Court of Appeals renders impossible the proper regulation of branching activities of national banks, and undermines the historic duality of the national and state banking systems.

The effect of the decision of the Court of Appeals will be to produce chaos in the regulation of branching activities of national banks. In the Fourth Circuit, under the *Farmers & Merchants* case, the threshold question of whether a given facility is or is not a branch bank will be determined under federal law, as this Court directed in the *Dickinson* case. In the Eighth Circuit, the question will be determined under state law, and there will be potentially different determinations in each of the seven states in that Circuit.[23]

In the remaining Circuits, federal courts will be left to choose between the irreconcilable rationales of the *Farmers & Merchants* case and the case at bar. Should these courts elect to follow the rule of the Court of Appeals in this case, ultimately there could be 45 different sets of state law criteria for determining whether a facility of a national bank is or is not a branch.[24] Further-

23 Minnesota, Iowa, Missouri, Arkansas, Nebraska, South Dakota and North Dakota.

24 I.e., in each of the 50 states except those five states comprising the Fourth Circuit.

more, each of these 45 sets of criteria would be subject to change at any time, without regard to the best interests of the national banking system, by state legislation or administrative interpretations.

Such a situation is incompatible with the necessity of uniform and consistent regulation of the national banking system by the Comptroller of the Currency and the federal courts. Further, it will destroy, in the branch banking area, the duality between the national and state banking systems which has existed for more than one hundred years[25], and which this Court historically has safeguarded.

This chaotic situation can be averted only if this Court grants certiorari in this case, and reiterates the rule of the *Dickinson* case, that the threshold question of whether a facility of a national bank is or is not a branch is to be determined under federal law, not state law. Federal courts have consistently followed the *Dickinson* rule ever since it was announced, and have developed a body of precedent under it, which, until now, has supplied authoritative guidelines to the Comptroller and to the national banking industry. The *Dickinson* rule, until now, has provided the basis for harmonious and consistent regulation of national banks in this area, as contemplated by Congress in the National Bank Act.[26]

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25 See Mr. Justice Clark's review of the legislative history of the National Bank Act in the Walker Bank case. First National Bank of Logan, Utah v. Walker Bank & Trust Company, 385 U. S. 252 (1966), 385 U. S. 256-60.

26 Id.

The decision of the Court of Appeals should not be permitted to subvert that rule, and to destroy this harmony and consistency. Left standing, inevitably it will do so.

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CONCLUSION

This Court should grant certiorari to resolve the irreconcilable conflict between the decision of the Court of Appeals in the case at bar and the decision of the Court of Appeals for the Fourth Circuit in the *Farmers & Merchants* case.

Because the decision of the Court of Appeals in this case is so patently in conflict with this Court's decisions in the *Dickinson* and *Walker Bank* cases, it is respectfully submitted that it would be appropriate for this Court to grant certiorari and summarily to reverse the decision and dismiss this action.

Respectfully submitted,

/s/ Virgil J. Haggart, Jr.

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Omaha, Nebraska 68102

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APPENDICES

APPENDIX A

THE REGIONAL ADMINISTRATOR OF
NATIONAL BANKS

TENTH NATIONAL BANK REGION

911 Main Street, Suite 2616

Kansas City, Missouri 64105

August 3, 1973

Office of the
Comptroller of the Currency

Mr. Frank O. Starr
President
The Omaha National Bank
Omaha, Nebraska 68102

Dear Mr. Starr:

This is in reply to your letter dated July 18, 1973, with enclosures, concerning relocation of the existing attached drive-in facility of The Omaha National Bank, Omaha, Nebraska, from the southwest corner of the intersection of 17th & Douglas Streets to the southwest corner of the intersection of 18th & Douglas Streets. You propose to construct and operate an expanded facility at a site located approximately 85 feet west of the nearest point of the Woodmen Towers office building in which the bank's main office business is conducted. Although separated therefrom by a city street, no structures nor any other property would intervene. Connection between the sites would be afforded by pneumatic tube. You list a number of disadvantages of the existing facility, operation at which would terminate if approval is granted, and summarize that the proposed expansion is necessary "in order to remain competitive in the downtown area, . . . provide a better level of service to our existing customers [,] and allow for

some factor growth, particularly in the drive-in service area." You seek approval to relocate and inquire whether this Office would continue to consider the proposed facility as an extension of the main office.

To determine whether a proposed addition to existing bank premises of either a main office or a branch amounts to a separate office or merely an extension or integral part thereof, it is necessary to examine all facts and circumstances surrounding the proposal, e.g., distance from the existing site, intervening structures, physical connection, and impact upon the balance of competition within the banking community. If, from an examination of all pertinent facts, no single one of which is controlling, it appears that the proposed facility would be so closely tied to an existing office as to be an integral part thereof and thus constitute a single banking operation, we would conclude that such an addition is merely an extension of existing bank premises and not a branch separate and apart therefrom.

Having reviewed the information made available in light of the criteria established by this Office and Federal courts on the issue, we conclude that your proposed expansion will constitute an integral part of the bank's main office operation, both actually and in the public mind, and that this expansion of the main bank will not result in an imbalance of competition within the banking community. Accordingly, this Office, having no objection to the relocation of said facility, will consider the new operation as an extension of the main banking premises for which certification by the Comptroller of the Currency is neither required nor issued.

Very truly yours,

/s/ John R. Burt

John R. Burt
Regional Administrator
Tenth National Bank Region

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 73-0-424

NEBRASKANS FOR INDEPENDENT BANKING, INC., a Nonprofit Corporation, et al.,
Plaintiffs,

vs.

THE OMAHA NATIONAL BANK, a National Banking Association,
Defendant.

MEMORANDUM AND ORDER

APPEARANCES: For Plaintiffs—D. Nick Caporale and James Moylan, of Omaha, Nebraska

For Defendant—Virgil J. Haggart, of Omaha, Nebraska

This matter is before the Court on plaintiffs' motion to remand [Filing #8] and defendant's motion to dissolve the temporary restraining order entered by the District Court of Douglas County, Nebraska [Filing #7]. This action was initially filed in the District Court of Douglas County, Nebraska, on November 20, 1973. On that same day, the District Court of Douglas County entered a temporary injunction enjoining the defendant, The Omaha National Bank, from maintaining or operating a detached auxiliary teller office at 18th & Douglas Streets, Omaha, Nebraska. On November 23, 1973, the defendant filed a petition for removal with this Court.

Considering first the plaintiffs' motion to remand, 28 U. S. C. § 1441 provides for the removal of actions from State courts. The relevant portion of that statute, for our purposes, provides as follows:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Plaintiffs argue that removal is improper, in that the complaint as filed in state court neither raises nor asserts any federal right or question, but that, to the contrary, is one based on a violation of Nebraska State Banking Law. Defendant, on the other hand, maintains that the action is one arising under 12 U. S. C. § 36 (f), which defines a branch bank under federal law.

The Court agrees with the defendant. The central question in the lawsuit is whether the facility now being constructed by the defendant is a branch. The answer to this question is determined by looking to federal and not state law.

> We reject the contention made by amicus curiae National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36 (f). *First National Bank in Plant City, Fla. v. Dickinson,* 396 U. S. 122, 133 [1969].

Also, in *Driscoll v. Northwestern National Bank of St. Paul,* 484 F.2d 173, 175 [1973], the 8th Circuit stated:

> . . . the threshold question of whether a proposed enlargement of a national bank is a "branch" is a question of federal law to be determined initially by the Comptroller and reviewed by the federal courts.

The complaint alleges that the Omaha National Bank is about to illegally establish a detached auxiliary teller

office,[1] which action the plaintiffs seek to enjoin. These allegations present rights and immunities arising from federal statutes and the case was properly removed.

The next matter concerns the temporary restraining order issued by the District Court of Douglas County, Nebraska. In considering the question of whether to continue an ex parte temporary restraining order, the same standards should be applied as would be applied in passing on an initial application for a temporary restraining order. *A. F. L. Motors, Inc. v. Chrysler Motors Corporation*, 183 F.Supp. 56 [1960].

In discussing the requirements for an ex parte temporary restraining order, Professor Moore states:

> Prior to the Federal Rules it was established that a temporary restraining order should not be granted without notice where there was no showing that irreparable injury was likely to result before a hearing could be had on the application for preliminary injunction. Rule 65 (b) continues that practice. The first sentence of subdivision (b) states that no temporary restraining order shall be granted without notice to the adverse party or his attorney "only if (1) it clearly appears from the specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition . . ." Moore's Federal Practice, Vol. 7, ¶ 65.06, p. 65-76.

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1 The term detached auxiliary teller office would fall within the general definition of branch in 12 U. S. C. § 36(f) which provides in pertinent part:

> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

Plaintiffs do not allege any specific facts which show irreparable injury and this Court would not have initially granted the ex parte temporary restraining order.

Having disposed of the pending motions, the Court would now like to discuss the future course which this case will follow. Central to this discussion is the role played by the Comptroller of Currency in determining whether the partially completed structure of The Omaha National Bank is a branch under Federal Law. In this regard, the Comptroller, through the Regional Administrator for the Tenth National Bank Region in a letter under date of August 3, 1973, informed the President of The Omaha National Bank that ". . . such an addition is merely an extension of existing bank premises and not a branch separate and apart therefrom." This letter was apparently in response to a letter from Mr. Starr, the President of The Omaha National Bank.

In the August 3, 1973, letter, the Regional Administrator, among other things, states ". . . we conclude that . . . this expansion of the main bank will not result in an imbalance of competition within the banking community." Since this conclusion was reached after considering an ex parte application of the defendant, this Court is of the opinion that the Comptroller should reconsider his conclusion after having given the plaintiffs an opportunity to present evidence to the contrary in an adversary proceeding. The defendant has agreed to submit an application to the Comptroller requesting that he reconsider his initial determination that the addition is merely an extension of existing bank premises. The Comptroller should place particular emphasis on the competitive

equality doctrine. See *Driscoll v. Northwestern National Bank of St. Paul, supra.*

In light of the above discussion, further proceedings in this matter will be stayed for two weeks from the date of this order to allow the parties to make application to the Comptroller for a rehearing on the issue presented by this lawsuit.

Orders overruling plaintiffs' motion to remand and sustaining defendant's motion to dissolve the Temporary Restraining Order have previously been entered.

IT IS SO ORDERED.

Dated this 30th day of November, 1973.

BY THE COURT

/s/Robert V. Denney
United States District Judge

THE ADMINISTRATOR OF NATIONAL BANKS
WASHINGTON, D. C. 20220

Office of the
Comptroller of the Currency

OPINION OF THE COMPTROLLER OF THE CURRENCY ON RECONSIDERATION OF PROPOSAL OF OMAHA NATIONAL BANK TO ESTABLISH WALK-UP/DRIVE-IN INSTALLATION AT 18th AND DOUGLAS STREETS, OMAHA, NEBRASKA.

This matter comes before the Comptroller on the request of the Omaha National Bank that the Comptroller reconsider a determination made in a letter dated August 3, 1973, that a certain addition to premises of Omaha National Bank ("ONB") at 18th and Douglas Streets, Omaha, Nebraska, constitutes merely an extension of existing bank premises and not a branch which would require approval and certification by the Comptroller pursuant to 12 U.S.C. § 36(c). The correctness of the Comptroller's initial determination in this regard has apparently been placed in issue in *Nebraskans for Independent Banking v.* the *Omaha National Bank,* Civil No. 73-0-424, U.S.D.C., D. Neb., wherein the District Court, on November 30, 1973, stayed proceedings ". . . to allow the parties to make application to the Comptroller for a rehearing on the issue. . . ."

Pursuant to the request of Omaha National, the Comptroller agreed to give the matter further consideration, and requested the parties to the litigation to facilitate this reconsideration by submitting all information which they believed pertinent in writing.

As their initial documentary submission, plaintiffs in the litigation[1] submitted a four-page letter (enclosing three photographs, the Nebraska branch bank statute, and a ruling of the Nebraska State Director of Banking), containing a mixture of facts, legal conclusions, and one conclusory statement regarding the balance of competition within the banking community:

> Because the Omaha National Bank is operating one more detached auxiliary teller office than any other bank in Nebraska could lawfully maintain, it has a competitive advantage over other Nebraska banks and has created an imbalance of competition within the banking community.

As its initial documentary submission, ONB submitted two bound volumes of photographic and documentary data including independent and in-house studies of public banking preferences generally and drive-in banking patterns and statistics in the Omaha area specifically. Approximately ten pages of the submitted data were devoted to an analysis of the impact of ONB's walk-up/drive-in on the balance of competition within the Omaha banking community. Both sides submitted written replies as requested. After review of the written submissions,[2] the Comptroller has concluded that an administrative hearing is both unwarranted and inappropriate.

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1 Nebraskans for Independent Banking, Inc., Douglas County Bank, First National Bank, First Westside Bank of Omaha, Southwest Bank of Omaha, Northside Bank, First West Roads Bank, and Bank of Millard.

2 In both their original and reply memoranda submitted to the Comptroller, counsel for plaintiffs in the District Court litigation have stated that "proper and adequate preparation of all of the pertinent evidence" requires the conduct of an administrative hearing and possible discovery proceedings. However, an examination of their memoranda discloses that many of the issues advanced are solely legal conclusions which do not appear from the memoranda submitted on behalf of the plaintiff banks to rest upon any specific factual assertions. Moreover, those matters which do appear to involve factual assertions are plainly capable of documentary support which for some reason counsel has chosen not to provide to the Comptroller.

The parties contentions in this matter boil down to a dispute over the proper application of § 8-157 R. S. of Nebraska 1943, (1973 Supplement) and 12 U. S. C. §§ 36(c) and (f) to a walk-up/drive-in structure of ONB. The Nebraska statute provides in pertinent part that:

> ". . . except as provided in § 2 of this section, the general business of every bank shall be transacted at the place of business specified in its charter.
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> • • • •
>
> "(2)(b) any bank may establish and maintain not more than two detached auxiliary teller offices, to be used as motor vehicle and walk-up off-street banking facilities, such offices to be within the corporate limits of the city in which the bank is located."

The National Bank Act does not limit the number of teller stations (walk-up, drive-in or otherwise) which a national bank may operate at a properly certificated location. However, a walk-up or drive-in structure may, under certain circumstances, be found as a matter of fact to be so far "apart from the chartered premises" as not to be properly a part thereof but, instead, to amount to a separate "branch office" or "branch agency" subject to the provisions of 12 U. S. C. § 36(c) and the varying location restrictions of State law which may be incorporated therein. The question thus posed, i. e. whether a particular structure to be constructed by a national bank in close proximity to an existing main office or branch is a separate "branch office" or simply an integral part of the existing structure, is an issue of Federal law which must be resolved in the first instance by this Office. 12 U. S. C. §§ 36(c) and (f). Resolution of this issue on any particular set of circumstances requires ap-

plication of a number of basically factual criteria which have been administratively and judicially developed over a number of years. Among the factors considered are distance from the existing site of the proposed site, intervening structures, physical connection, alternate choices, if any, for expansion of existing facilities, and impact of the proposed structure upon the balance of competition within the banking community. If, from an examination of all pertinent factors, no single one of which is controlling, it appears that the proposed structure will be so closely tied to an existing office as to be an integral part thereof and thus constitute a single banking operation, the Comptroller's Office must conclude that such a proposed addition is merely an extension of the existing bank premises and not a branch separate and apart therefrom.

At this date, ONB conducts its banking operations within portions of the Woodman [*sic*] Towers, a walk-up/drive-in structure at 18th and Douglas Streets, and at two branch locations (equivalent to detached auxiliary teller offices for state banks) at 108th and L Streets and 1830 Dodge Street, all within the corporate limits of Omaha, Nebraska. Protestant banks contend that ONB's walk-up/drive-in structure at 18th and Douglas Streets is a third branch bank impermissible for state and national banks in Nebraska. ONB contends, on the other hand, that the 18th and Douglas Streets structure is no more than an extension of its main banking premises, that it is not an additional branch office or agency apart from the chartered premises of the bank, and that Federal and Nebraska branching statutes thus are inapplicable to preclude its operation.

The 18th and Douglas Streets installation is situated diagonally across 18th Street from ONB's main offices in the Woodman Tower with a distance of approximately 102 feet between the property line of the walk-up/drive-in and the property line of the Woodman Tower.[3] The two locations are separated by 18th Street which appears to be a major street in downtown Omaha although not a major traffic artery because it has been truncated two blocks to the north of ONB by the Civic Auditorium and to the south at Farnum [*sic*] Street (the intersection adjacent to ONB) where 18th Street becomes a pedestrian mall.

There are no structures intervening between Woodman Tower and the walk-up/drive-in installation. The walk-up/drive-in is diagonally opposite ONB in the Woodman Tower, so that these two banking installations are on the opposite sides of 18th Street in the same block, at opposite ends of the block, and within clear un-

3 Protestant's dispute the distance measured between the walk-up/drive-in installation and the bank's offices in the Woodman Tower, contending that since that portion of the bank's main premises which are situated at ground level in the Woodman Tower do not fully occupy the ground level floor of the tower building, but only two-thirds thereof, that the distance between the walk-up/drive-in installation and the bank should be measured from the property line of the walk-up/drive-in installation across 18th Street through the public lobby of the Woodman Tower to the entrance of the banking floor at ground level. We, however, are of the opinion that the appropriate distance to be measured is between the two respective property lines. We base our conclusion upon the fact that ONB occupies other areas at other levels of the Woodman Tower, and in fact, ONB premises on floors above and below the ground level occupy the entire space available in the Woodman Tower, extending completely to the 18th Street side of the building. Therefore, we have concluded that the bank's main banking premises are sufficiently distributed throughout the entire Woodman building to justify measuring from the property line of that building to the property line of the walk-up/drive-in to determine the distance separating these two banking installations.

interrupted view of each other. The walk-up/drive-in installation is physically connected to ONB premises in the Woodman Tower by a system of pneumatic tubes for the conveyance of documents and currency and by direct telephone connection.

The walk-up/drive-in installation was located as near to the ONB's premises in the Woodman Tower as practicably available land would permit. There was no available site less distant from the Woodman Tower location which could have served as an alternative site for the walk-up/drive-in installation (e. g., the property adjacent to the Woodman Tower within the same block is occupied by The World Insurance Building; properties across Farnum and 18th Streets are occupied by major existing buildings and were not available to ONB for expansion).

The bank stated as its reasons for desiring to establish the walk-up/drive-in installation that the previously existing drive-in facilities of the bank were not only inadequate to accomodate the number of customers patronizing such installations and the volume of business created thereby, but that customer vehicles coming to the bank's drive-in windows caused considerable traffic congestion at the pre-existing drive-in banking locations due to inadequate stacking space. In constructing this consolidated installation at 18th and Douglas Streets, ONB sought to increase the number of drive-in windows available to its customers and to relieve the congestion which the previous installations had created and consequently, to serve more conveniently the bank's clientele.

Facts which have recently been provided by the interested parties, herein, demonstrate that ONB's walk-

up/drive-in installation is not obnoxiously close (more than the 300 feet as required by Nebraska statutes) to the main office of any other bank including the protestant banks. The new installation has increased the number of drive-in windows available to customers of ONB by two in number and has substantially increased the "stacking space" for vehicles to be served thereby. The materials submitted demonstrate that ONB's primary service area does not overlap the primary service areas of suburban banks and consequently, that such suburban banks are not materially affected by the establishment of its new walk-up/drive-in installation. Indeed, it has been demonstrated that suburban bank customers are more adequately served by their banks with respect to drive-in facilities than are the customers of ONB, even with ONB's addition of two new drive-in windows.

The only banks which could be materially affected by the establishment of ONB's walk-up/drive-in installation are other "downtown" banks *e. g.,* First National Bank of Omaha and U. S. National Bank of Omaha which share overlapping primary service areas. However, it must be noted that ONB closed down its pre-existing drive-in installations when it opened its present installation at 18th and Douglas Streets. Through the use of in-house and independent studies of market preferences, trends and banking statistics, ONB has illustrated that its establishment of the Douglas and 18th Streets installation has not substantially changed the pattern of banking in Omaha among it and its competitors while plaintiffs have made no attempt to offer any similar information regarding the impact of the walk-up/drive-in installation upon the banking community.

In 1973, although ONB served by far more drive-in customers than any other bank, a summary of availability of drive-in windows per retail customer, demonstrates that the protestant banks had and still have a greater availability of drive-in windows for their customers than does ONB. This is attributable to the fact that ONB serves more drive-in customers, both retail and commercial, than any of its competitors. It is, therefore, not surprising that the bank requires more drive-in windows than its competitors to serve its existing customers. Moreover, it is apparent from an independent preference study of the *Omaha World Herald* that during 1973 ONB's overall retail market share decreased while protestant First National Bank's retail market share increased and internal figures of the ONB reveal that its new walk-up/drive-in installation at 18th and Douglas Streets, during the month of January, on a per-day basis, actually served fewer customers than did the pre-existing two drive-in installations during the month of December 1973. Although ONB had, prior to the establishment of the Douglas and 18th Streets installation, more drive-in windows downtown than its competitors, the figures which ONB has provided indicate that on the basis of per window volume, prior to the establishment of its new installation, ONB ranked between U. S. National Bank and First National Bank, and after the establishment of its new installation, ONB still ranked between the U. S. National Bank and First National Bank but with a relatively minor change, *i. e.*, previously ONB's per window volume had been slightly above the average of all three banks after establishment of the new installation ONB ranked slightly below the average of the three bank's

per window volume. Overall, the record demonstrates that whatever changes have taken place in the banking community in Omaha, as a result of the establishment of ONB's new walk-up/drive-in installation at Douglas and 18th Streets, those changes have been exceptionally minor.

Conclusion

From the facts presented by interested parties and those otherwise available to the Office of the Comptroller of the Currency I am satisfied that the earlier judgment by the Comptroller's Office that ONB's proposed walk-up/drive-in installation to be established at 18th and Douglas Streets, would not have a significant impact upon the balance of competition within the Omaha banking community was an accurate estimate. Furthermore, the other facts and circumstances surrounding the establishment of the walk-up/drive-in installation, in my judgment, require, on balance, the conclusion that it is not a separate entity apart from the main banking premises of ONB but that it is actually and logically an expansion of those premises, so closely connected as to be an integral part of the total main banking operation. The Comptroller's August 3, 1973, determination that ONB's 18th and Douglas Street drive-in/walk-up structure is not a branch requiring certification or approval by the Comptroller thus should be and is reaffirmed.

/s/ James E. Smith
Comptroller of the Currency

June 26, 1974
Dated

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 73-0-424

NEBRASKANS FOR INDEPENDENT BANKING, INC., a non-profit corporation, et al.,

Plaintiffs,

vs.

THE OMAHA NATIONAL BANK, a National Banking Association,

Defendant.

ORDER

This matter comes before the Court subsequent to trial on the merits of the plaintiffs' Amended Complaint [Filing #16].

For the reasons delineated in a Memorandum filed contemporaneously herewith, the Court finds that the walk-in/drive-in facility of The Omaha National Bank at 18th & Douglas Streets, Omaha, Nebraska, to be an integrated extension of the main bank, and that such facility is not a branch bank under federal law.

IT IS THEREFORE ORDERED that the above captioned case is dismissed with prejudice, each party to bear its own costs.

IT IS FURTHER ORDERED that the motion of the defendant for summary judgment [Filing #70] is overruled as moot.

Dated this 13th day of January, 1975.

BY THE COURT

/s/ Robert V. Denney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 73-0-424

NEBRASKANS FOR INDEPENDENT BANKING, INC., a Nonprofit Corporation, et al.,

Plaintiffs,

vs.

THE OMAHA NATIONAL BANK, a National Banking Association,

Defendant.

MEMORANDUM

APPEARANCES: For Plaintiffs—D. Nick Caporale and Marvin Schmid, of Omaha, Nebraska

For Defendant — Virgil J. Haggart, Jr. and Craig W. Thompson, of Omaha, Nebraska

DENNEY, District Judge

This matter comes before the Court subsequent to a full and complete hearing on the merits of the plaintiffs' Amended Complaint [Filing No. 16].

The defendant, pursuant to 28 U.S.C. § 1441, removed this cause of action filed against it in the District Court of the State of Nebraska under the jurisdictional scope of Title 28, United States Code, § 1331, providing that the issue encompassing the question as to whether a particular facility of a national banking association constitutes a branch bank is a federal question. 12 U.S.C. § 36. The matter in controversy well exceeds the value of $10,000, exclusive of interest and costs. Pursuant to the authority of 12 U.S.C. §§ 1 and 36(e), the Comptroller of the Currency had determined that

the facility of the Omaha National Bank at 18th and Douglas Streets, Omaha, Nebraska, constituted an extension of the main banking premises and was not a branch. Though this explicitly is not an appeal from that decision, the Court is in agreement with that adjudication.

The plaintiff, Nebraskans for Independent Banking, Inc., is a non-profit corporation consisting of more than 200 bankers throughout Nebraska; First National Bank of Omaha and Packers National Bank are national banking associations doing business in the State of Nebraska; Douglas County Bank, First West Side Bank, Southwest Bank of Omaha, North Side Bank, First Westroads Bank and Bank of Millard are banking corporations organized and chartered under the laws of the State of Nebraska. The defendant, The Omaha National Bank, is a national banking association doing business in Omaha, Douglas County, Nebraska.

Though the plaintiffs have on occasion attempted to bifurcate the cardinal issue in this case in contending that this Court's scrutiny should be drawn to every facet of operation conducted by The Omaha National Bank, the Court restricts itself to the ultimate allegation that the facility of the aforementioned bank at 18th & Douglas Streets is a separate and independent banking operation, manifesting the functional and physical characteristics of a branch bank.[1] From an objective analysis of the

1 Plaintiffs' Amended Complaint, Filing No. 16, Paragraph IV: "The establishment, maintenance and operation of three branches by defendant violates the law of Nebraska as applied to national banking associations as aforesaid and gives defendant a competitive advantage over plaintiffs for defendant is maintaining and operating one more branch than plaintiffs are entitled to lawfully maintain and operate. . . ."

evidence adduced at trial, the detached facilities of The Omaha National Bank on the southwest corner of 108th and "M" Streets (4818 South 108th Street) and 42nd & Grover Streets (4066 Vinton Street) are auxiliary teller offices and branches under the definition of 12 U. S. C. § 36(f). Therefore, the residuary investigation encompasses a determination (a) of the conditions constricting The Omaha National Bank to erect a free-standing facility at 18th & Douglas Streets, and (b) the integration of operation between the 18th & Douglas facility and the main bank at 17th & Farnam Streets. This examination does embrace a concomitant consideration of both the regional increase for customer service and the geographical expansion attributed to the utilization of the 18th & Douglas facility.

Although this Court recognizes the competitive disturbance and substantial advantage eventuating from the operation of three detached auxiliary facilities, the Court does find the free standing facility of The Omaha National Bank at 18th & Douglas to be neither a branch bank as defined under 12 U. S. C. § 36(f) and unauthorized by Section 8-157 R. R. S. (Laws of Nebraska 1973) nor a detached auxiliary facility, but rather an integrated extension of the main bank premises.

The aforementioned statute empowers any bank to maintain one attached auxiliary teller office and two detached auxiliary teller offices. An evenhanded interpretation of its contemplated purpose is to provide to banking patrons a convenient avenue to pursue their routine banking business in an offstreet facility accessible by either motor vehicle or by walking in. Even though the distance between the bank's facilities in the Woodmen

Tower and the 18th & Douglas facility, including the width of 18th Street, which is a moderately traveled truncated street, is 102 feet (measured in a straight line diagonally from the northwest corner of the Woodmen Tower Building to the southeast corner of the property upon which the walk-in/drive-in facility is located), the integration of operation between the main bank and this auxiliary teller office under the geographical restrictions exhibited in this case, coincident with the regular utilization of the functional underground pneumatic tube system, warrants this Court in finding that the facility in issue is physically and operationally attached. The contention asserted that the "real" distance between the main bank and this detached facility is more accurately calculated as the distance a hypothetical customer would pursue from the main doors of the 18th & Douglas facility (such being on the southwestern corner of 18th & Douglas) and the customer service facilities of the main bank in the eastern half of the Woodmen Tower Building (such being on the southeastern quadrant of 17th & Farnam—one block south and one block east of 18th & Douglas) is rejected as the "proper" measure of determining the proximity of banking operations. *Jackson v. First National Bank of Valdosta*, 246 F.Supp. 134 (M. D. Ga. 1965). The positioning of a night depository on the main floor of the Woodmen Tower at a substantial distance to the west of the main bank's premises for customer service and the utilization of several entire floors above the main floor of the Woodmen Tower Building, which abuts 18th Street on the west, exhibits the pervading presence of the operations of the Omaha National Bank on the southern half of the block contiguous to Farnam Street from 17th to 18th Streets.

Special consideration has been directed toward Regulation 8-157-01 of the Department of Banking relative to the question as to whether the banking transactions permitted under the statute were conducted "apart from the chartered premises." *First National Bank in Plant City, Florida v. Dickinson*, 396 U. S. 122, 135 (1969). This Court is in accord with the guidance manifested in this regulation in that merely connecting a main banking house to a detached facility by means of a system of pneumatic tubes does not convert the detached facility into an attached facility. However, the peculiar facts and relevant factors of this case exhibit an integration of operation which accommodates customers coming to the main banking house. The situation presented in this case was not contemplated by the regulation. Therefore, common sense, along with an ever present recognition of the purpose of the McFadden Act in attempting to equalize the position of state and national banks relative to the number of "branch" banks, must be applied.

One of the more critical aspects of this case is the consideration exhibited by the defendant to the possibility of an alternate site for an attached auxiliary teller office. This Court has scrutinized the move of the Omaha National Bank from its prior attached facility immediately to the north of its main bank premises at 17th & Farnam. The reasons for the move are reasonable and compelling. The severe traffic congestion that prevailed at the entrance and exits of this facility several hours a day demanded either a structural change or a move. (A material factor contributing to this congestion was the uncontemplated alteration of the direction of the one-way

traffic on 17th Street from northbound to southbound subsequent to the erection of this edifice). Since this facility was entrenched within the ground floor of approximately an eight story parking lot, the options for structural modification when considering the magnitude of the building's pillars within the ground floor and at the outlets of ingress and egress were neither physically nor financially feasible. The carbon monoxide buildup from the stacked automobiles on the tunneled approach ramp to the teller windows was a substantial safety hazard also impelling a change.

A documentation of the geographical restrictions confronting The Omaha National Bank is amply delineated in the record. The extortionate expenditures demanded by the landowners at 18th & Farnam prohibited any attempt to secure an "attached" auxiliary teller office in this region. The extensive county and city land use in this area was also a constricting factor. The alternatives closer than the ultimate site selected were occupied by multi-story buildings resting upon irregular grades whose costs were prohibitive. The defendant, therefore, erected this auxiliary facility as close to its main bank as possible with the absence of any intervening structures between them on a parcel of real estate previously utilized as a commercial parking lot. Under such conditions, a court should not preclude an established bank from meeting the needs, preferences, and modern banking habits of its customers because of its physical location established long before such needs arose.

The facts in the instant case support the finding that the purpose of the contested facility was an adjunct or

annex to the existing main bank. A substantial part of the "deposited" business from the 18th & Douglas facility was routed to various sectors within the main bank where it was processed. Maintenance of cash at this facility was solely for operating needs and was contained within a detached, reach-in cash chest of one inch steel plate within six inches of factory poured concrete. The security system for this facility was monitored within the main bank rather than at the Police Station as were the systems at the detached facilities. Though the initial management at this facility was somewhat autonomous when this suit was filed, the Court has not deciphered the complicated and enmeshed organizational structure of this integrated operation to be either an overshadowing or preponderant factor. Rather, the functioning of this facility evinces its inherent characteristics of a dependent auxiliary teller office. The operational authority of the 18th & Douglas facility emanates from and is actively supervised by the officers located within the main bank.

The criterion of *First National Bank in Plant City, Fla. v. Dickinson, supra,* and *Commonwealth of Virginia, ex rel. State Corporation Commission v. Farmers and Merchants National Bank,* No. 74-C-31-H (W. D. Va. Aug. 8, 1974), have analogous application to the instant case. The 18th & Douglas facility did not expand in a material way customer access in a geographical area not previously served, nor is the facility so situated physically as to give The Omaha National Bank a material competitive advantage in securing customers. Only customer convenience and the safety of the customer and local traffic, both

pedestrian and automobile, have been affected. The customer must still walk or drive to approximately the same area.

The Court has considered the effect on competition precipitated by the mere "position" of the 18th & Douglas facility. On this particular aspect, the Court has reviewed all the evidence and examined the opinion of the opinion of the Comptroller of the Currency. [Defendant's Exhibit #1]:

> . . . ONB's walk-up/drive-in installation is not obnoxiously close (more than the 300 feet as required by Nebraska statutes) to the main office of any other bank including the protestant banks. The new installation has increased the number of drive-in windows available to customers of ONB by two in number and has substantially increased "stacking space" for vehicles to be served thereby. The materials submitted demonstrate that ONB's primary service areas do not overlap the primary service areas of suburban banks and consequently, that such suburban banks are not materially affected by the establishment of its new walk-up/drive-in installation . . .
>
> . . . ONB has illustrated that its establishment of the Douglas and 18th Streets installation has not substantially changed the pattern of banking in Omaha among it and its competitors . . .
>
> . . . Overall, the record demonstrates that whatever changes have taken place in the banking community in Omaha, as a result of the establishment of ONB's new walk-up/drive-in installation at Douglas and 18th Streets, those changes have been exceptionally minor. . . . op. cit. at 271 and 272.

The facts surrounding the question of the effect upon competition precipitated by the position of this facility were fully developed in accordance with established prece-

dent in the defendant's submission to the Comptroller. The Court has reviewed this question and has made an independent finding which is in agreement with the Comptroller of the Currency.

Recognizing that each case must be decided on its own merits, with no single factor controlling, *North Davis Bank v. First National Bank of Layton,* 457 F. 2d 820 (10 Cir. 1972), the Court finds that The Omaha National Bank is now in substantially the same position as at the time it operated the congested 17th & Douglas facility. Only after considering all the relevant factors and circumstances peculiar to this case has this Court determined that the defendant's drive-in/walk-in facility at 18th & Douglas does not constitute a detached auxiliary facility nor has it materially increased the region of customer service.

An order is filed contemporaneously herewith in accordance with the determinations delineated herein.

Dated this 13th day of January, 1975.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1109

NEBRASKANS FOR INDEPENDENT BANKING, INC.; DOUGLAS COUNTY BANK; FIRST NATIONAL BANK OF OMAHA; PACKERS NATIONAL BANK; FIRST WEST SIDE BANK OF OMAHA; SOUTHWEST BANK OF OMAHA; NORTH SIDE BANK; FIRST WESTROADS BANK; and BANK OF MILLARD,

Appellants,

v.

THE OMAHA NATIONAL BANK, a National Banking Association,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

Submitted: June 13, 1975

Filed: August 5, 1975

Before GIBSON, Chief Judge, WEBSTER, Circuit Judge, and DEVITT, Chief District Judge.*

DEVITT, Chief District Judge.

* The Honorable Edward J. Devitt, Chief Judge for the District of Minnesota, sitting by designation.

At issue in this appeal is the propriety of the district court's finding that Omaha National Bank's drive-in/walk-in facility in a separate nearby building was an integral part of its main banking office and not to be counted as one of two permitted branch banks.

Appellee, Omaha National Bank, is located in downtown Omaha, Nebraska, in the Woodmen Tower Building which occupies the south half of the block bounded by 17th and 18th Streets on the east and west and Douglas and Farnam Streets on the north and south. Its drive-in/walk-in facility is located across the street at 18th and Douglas Streets.

Appellants, competitors of Omaha National, are two national banking associations, six state chartered banks and Nebraskans for Independent Banking, Inc., an organization of more than two hundred Nebraska bankers.

Nebraska law permits each state chartered bank to operate two branches or "detached auxiliary teller offices" to be used as motor vehicle and walk-up banking facilities. Section 8-157, Neb. Rev. Stats. (C. S. 1974). Federal law authorizes national banks to operate branches to the extent authorized to state banks in the state where located, 12 U. S. C. 36 (f).

Omaha National now operates two "detached auxiliary teller offices" several miles from its main office, one at 108th and M Streets and one at 42nd and Grover Streets.

Appellants argue that Omaha National's facility at 18th and Douglas Streets is not an integral part of Omaha National's main banking office but in reality is a "de-

tached auxiliary teller office" or a branch bank, and the District Court's decision permits Omaha National to operate three, rather than the permitted two, branch banks to the competitive prejudice of other banks in Nebraska and in contravention of the policy of "competitive equality" between national and state banks sought to be established by the McFadden Act, 12 U. S. C. 36 (f).

The Comptroller of the Currency advised Omaha National on August 3, 1973 that he approved of its proposed construction of the facility at 18th and Douglas Streets and that it was "an extension of the main banking premises" and would constitute "an integral part of the bank's main office operation." Construction started September 4, 1973. The present appellants obtained a restraining order in the state court. The case was removed to federal court under 28 U. S. C. 1441. United States District Judge Robert V. Denney later dissolved the restraining order and asked the Comptroller of the Currency to reconsider his decision and give the opponents an opportunity to be heard at an adversary hearing. The Comptroller later advised Judge Denney that an administrative hearing was "unwarranted and inappropriate" and concluded, on the basis of the record and additional evidence submitted, that the proposed new facility would not have a significant impact upon the balance of competition within the Omaha banking community and that the proposed facility "is actually and logically an extension of" the main banking premises across the street. He said the proposed facility was not a branch requiring certification by the Comptroller of the Currency.

Judge Denney then set the case for trial, heard evidence, received written briefs, and found the 18th and

Douglas facility "to be an integrated extension of the main bank * * * not a branch bank under federal law" and dismissed the case.

The issue is whether this finding is clearly erroneous. Fed. Rules of Civ. Proc. 52 (a). *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562 (1969).

It is not disputed that the determination of what constitutes a "branch" under 12 U. S. C. § 36 is a question of federal, not state law. *First National Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337 (1969); *Driscoll v. Northwestern National Bank of St. Paul*, 484 F.2d 173 (8th Cir. 1973). In making the determination it did, the District Court had available to it numerous recent decisions of federal courts deciding similar questions, cases occasioned by the ongoing dispute, principally between federal and state banks, as to the competitive effect of the extension of branch banking. The principal cases are: *First National Bank in Plant City, Florida v. Dickinson, supra; First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966); *Driscoll v. Northwestern National Bank of St. Paul*, 484 F.2d 173 (8th Cir. 1973); *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (10th Cir. 1972); *Commonwealth of Virginia v. Farmers and Merchants National Bank*, 380 F. Supp. 568 (W. D. Va. 1974); *Dunn v. First National Bank of Cartersville*, 345 F. Supp. 853 (N. D. Ga. 1972); *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W. D. Wash. 1966); *Jackson v. First National Bank of Valdosta*, 246 F. Supp. 134 (M. D. Ga. 1965).

The decisions in these cases have been based upon different criteria including the distance separating the main banking house and the facility in question, the presence or absence of intervening structures, the physical connection, if any, between the bank and the facility, the effect on competition, the presence or absence of pneumatic tube connections between the bank and the facility, the nature and extent of banking operations conducted in the facility and the extent to which the facility is dependent upon the main bank in its day-to-day operations. These and other factors were presented to the District Court and have been argued to us as applicable to the fact situation here.

There is no fixed test for determining what constitutes a branch bank. *First National Bank in Plant City, Florida v. Dickinson, supra.* Each case must be considered on its own facts. *North Davis Bank v. First National Bank of Layton, supra.*

The district court embodied its findings in a memo randum, unreported, in which it considered the arguments with reference to the several criteria for determining whether a facility is a branch. The court found that even though the facility was 102 feet from the bank building by a straight line measurement, the integration of operations between the main bank and the auxiliary teller office, the direction of the facility's business by officers in the main bank, and the regular utilization of an underground pneumatic tube system between the bank and auxiliary office were significant factors in determining that the facility was a part of the main bank. The court pointed out the pervasiveness of the presence of Omaha National in the entire south half of the block across the

street from the new drive-in facility. Its banking facilities in this area included its main banking floor, several entire floors above the main floor of Woodmen Tower and a night depository on the main floor lobby level at a substantial distance west of the bank's main baking [*sic*] floor.

The district court discussed the efforts made by Omaha National to find a suitable nearby alternate site as a drive-in facility. Before starting construction of the facility in question here, Omaha National operated an auxiliary drive-in facility in a building adjacent to the main bank building. A combination of circumstances required the bank to either structurally modify the existing facility or to move it to a new location. The operations occupied the ground floor of an eight story parking ramp and it was not feasible to satisfactorily modify the facility.

Alternative sites closer than the one ultimately selected were not available except at prohibitive cost. The court concluded that Omaha National erected it auxiliary drive-in facility as close to its main building as possible. In view of the difficulty of securing property closer to the main bank building, the court said that it should not "preclude an established bank from meeting the needs, preferences, and modern banking habits of its customers because of its physical location established long before such needs arose."

The court found that "the 18th and Douglas facility did not expand in a material way customer access in a geographical area not previously served," and that the facility was not so situated physically "as to give the Omaha National Bank a material competitive advantage

in securing customers." The trial court viewed the new drive-in as a mere physical expansion of Omaha National's existing banking operations and concluded the facility was an "adjunct or anex [*sic*] to the existing main bank" and its functioning showed the "inherent characteristics of a dependent auxiliary teller office."

In our view, these findings are amply supported in the record and are not clearly erroneous. In addition, the independent findings made by the district court are consistent with the findings and judgment of the Comptroller of the Currency, the officer vested with regulatory authority over the operation of national banks. Even standing alone, this determination of the Comptroller's office is entitled to great weight, absent a showing that it was arbitrary or capricious. *Sterling National Bank of Davie v. Camp,* 431 F.2d 514 (5th Cir. 1970).

Another fact finder well might have reached the contrary conclusion, but in applying the clearly erroneous standard of Rule 52(a), we must remember that our function is not to decide factual issues de novo. Our authority, when reviewing the findings of a trial judge, is circumscribed by the deference we must give to his decision since he is usually in a superior position to appraise and weigh the evidence. *Zenith Corp. v. Hazeltine, supra.*

In summary, the district court found the drive-in facility, although in an unattached nearby building, was closely integrated in operation with the main bank, did not materially expand customers' access geographically or afford a material competitive advantage, and accordingly should be viewed as an integrated extension of the main bank and not as a branch bank under 12 U. S. C. 36.

This was a permissible conclusion for it to reach and the order of the district court dismissing the action is affirmed.

GIBSON, Chief Judge, dissenting.

I respectfully dissent for I believe the district court decision and the majority opinion in this case ignore and render meaningless the concept of "competitive equality" underlying the McFadden Act, 12 U. S. C. § 36 (1970). *See First National Bank v. Dickinson,* 396 U. S. 122, 130-34 (1969); *First National Bank v. Walker Bank & Trust Co.,* 385 U.S. 252, 261-62 (1966). As stated by Chief Justice Burger:

> [T]he definition of "branch" in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.* (Footnote omitted.)

First National Bank v. Dickinson, supra at 134.

There can, of course, be no quarrel with the majority's recognition that what constitutes a branch is a question of federal and not state law. *First National Bank v. Dickinson, supra; Driscoll v. Northwestern National Bank,* 484 F.2d 173 (8th Cir. 1973). However, state law is material as to how, *where,* and when branch banks may be operated. *First National Bank v. Dickinson, supra* at 133. National banks may compete by branch banking "only to the extent that the state laws permit branch banking." *First National Bank v. Walker Bank & Trust Co., supra* at 261; *Driscoll v. Northwestern National Bank, supra* at 175.

Branch is defined in § 36(f) as including:

> [A]ny branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Although recognizing that this definition "may not be a model of precision," the Supreme Court has held that:

> [T]he term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises. (Emphasis in original.)

First National Bank v. Dickinson, supra at 135.

The phrase "apart from the chartered premises" is really in issue in this case. This language may not mean that any free-standing facility is a branch. *Virginia v. Farmers & Merchants National Bank*, 380 F. Supp. 568, 572 (W.D.Va. 1975), *aff'd*, No. 74-2156 (4th Cir. May 5, 1975). However, the concept of competitive equality does suggest that in making the determination, whether or not such a facility would be allowed a state bank is a prime consideration. There is little doubt but that a Nebraska state bank would not be allowed the four facilities operated by Omaha National Bank. Neb. Rev. Stat. § 8-157 (Supp. 1974) allows each bank, subject to geographic limitations, to maintain two detached auxiliary teller offices and one attached auxiliary teller office.[1]

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1 Regulations issued by the Nebraska Department of Banking July 27, 1970, provide:

> 85-157-01. [sic] Attached and detached auxiliary teller offices.
>
> * * *
>
> (b) An attached auxiliary teller office contemplates a physical connection, a constructed attachment whereby there exists a single, integrated banking operation at the main banking house, expanded to accommodate customers coming to the main banking house. Connecting a main banking house to a detached facility by means of a system of pneumatic tubes and/or closed circuit television does not covert the detached facility to an attached facility.

The majority's decision allows Omaha National Bank to operate three detached auxiliary teller offices in derogation of Nebraska's law concerning branch banking and in derogation of the concept of competitive equality as expressed in § 36(f) and the Supreme Court decisions in *First National Bank v. Dickinson, supra,* and *First National Bank v. Walker Bank & Trust Co., supra.* Therefore, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1109

Nebraskans for Independent Banking, Inc.; Douglas County Bank; First National Bank of Omaha; Packers National Bank; First West Side Bank of Omaha; Southwest Bank of Omaha; North Side Bank; First Westroads Bank; and Bank of Millard,

Appellants,

v.

The Omaha National Bank,
a National Banking Association,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Submitted: November 12, 1975
Filed: February 3, 1976

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, WEBSTER and HENLEY, Circuit Judges, *en banc*.

GIBSON, Chief Judge.

The plaintiffs-appellants, a group of national and state banks and a trade organization formed to foster independent banking, seek a declaratory judgment and injunctive relief[1] against the defendant-appellee, The Omaha National Bank in Omaha, Nebraska. The plaintiffs claim that Omaha National is maintaining and operating three branch banking facilities, rather than two such facilities, in violation of state and federal law.

1 This action initially was filed in the state court and was removed by The Omaha National Bank to the United States District Court.

A divided panel of this court, in an opinion filed August 5, 1975, affirmed the decision of the United States District Court holding that one of the facilities challenged was only an extension of the main bank, not a branch, thus dismissing plaintiffs' complaint. A petition for rehearing en banc was granted, which action vacated the panel opinion.

After full consideration by the court en banc, the judgment of the District Court is reversed and remanded with directions to enter a judgment finding that Omaha National Bank is violating applicable federal law by operating three detached banking facilities and ordering that one of these facilities be eliminated.

Under Nebraska law, subject to geographic limits, state-chartered banks are permitted to maintain one "attached" and two "detached auxiliary teller offices." Neb. Rev. Stat. § 8-157 (Supp. 1974). The McFadden Act, 12 U.S.C. § 36 (1970), incorporates state law setting forth limits upon a national bank's maintenance and use of branch facilities.[2]

2 Section 36 in pertinent part reads as follows:

§ 36. Branch banks.

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in

(Continued on next page)

Omaha National's main bank is located in the 30-story, multi-tenant Woodmen Tower Building in downtown Omaha, occupying the south half of the block bounded by 17th Street on the east, 18th Street on the west, Douglas Street on the north, and Farnam Street on the south (See Fig. 1.) Omaha National also operates two outlying banking facilities acknowledged by all parties to be branches under federal law and certified as such by the Comptroller of the Currency pursuant to 12 U. S. C. § 36. One branch is located at 108th and "M" Streets and the other at 42nd and Grover Streets, both within the city limits of Omaha.

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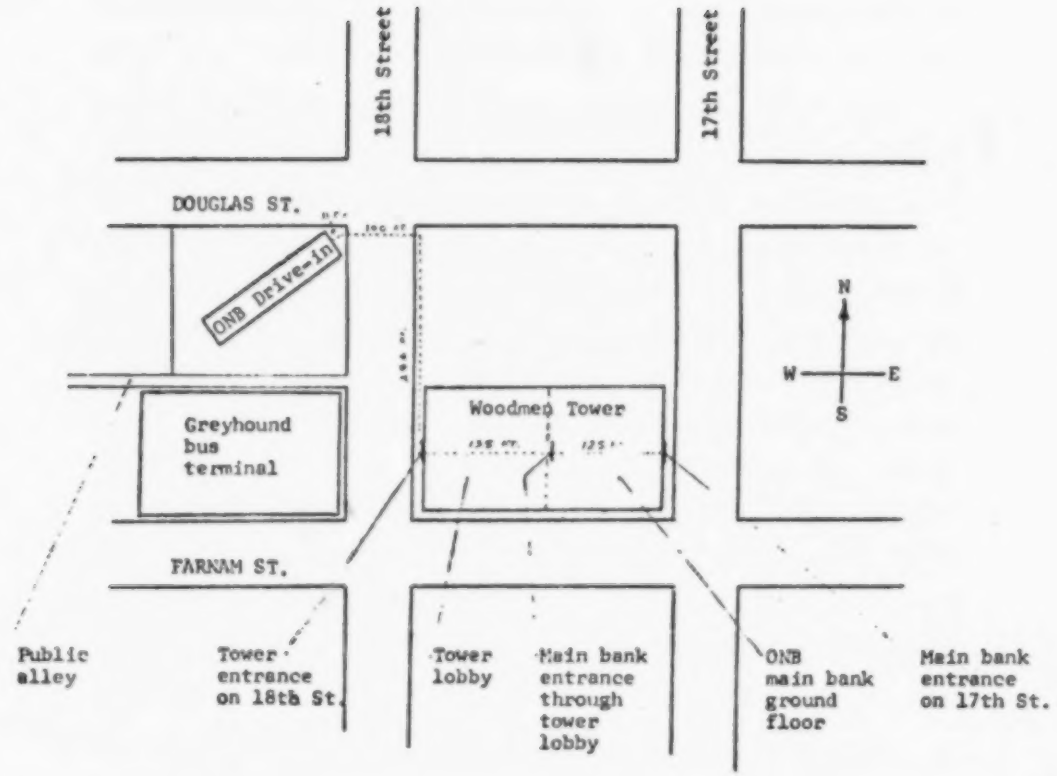
which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.



Relative location of ONB main bank and 18th & Douglas facility.

FIG. 1.

The focal point of this lawsuit is Omaha National's operation of another walk-up/drive-in facility located on leased realty at the southwest corner of 18th and Douglas Streets, directly to the west of the northern half of the block upon which the Woodmen Tower is situated. The plaintiffs contend this facility is also a branch which, when coupled with the other two admitted branch facilities, constitutes an operation by Omaha National of three branch banking facilities in violation of the appiicable statutes. Omaha National, on the other hand, contends

the 18th and Douglas facility is merely an extension of its main bank operation, not a branch.

The 18th and Douglas facility is a detached office facility with ten drive-in and six walk-in teller stations. It is a custom-built, free-standing building unattached to the main bank. There is a pneumatic tube connection between the two buildings used by the bank to transport currency and papers. The facility is separately staffed, has a separate telephone listing, offers most of the customary banking services, accepts deposits, cashes checks, makes non-commercial loans and maintains somewhat longer public hours than does the main bank. It does not offer safe deposit boxes, trust services or, according to its brief, international banking or commercial loans. Its net deposits are transported to the main bank by armored car.

Approximately ten weeks after Omaha National began constructing the new facility, plaintiffs obtained a state court order restraining Omaha National from operating it as a detached auxiliary teller office. After removal to the federal court pursuant to 28 U. S. C. § 1441 (1970), the District Court dissolved the state restraining order and stayed proceedings, directing Omaha National to ask the Comptroller of the Currency to reconsider the Regional Administrator's prior ex parte ruling, obtained by Omaha National before construction, that the planned facility would not constitute a branch requiring federal certification. The Comptroller, after reconsidering additional submissions by both parties, again concluded that an adverse administrative hearing would be unwarranted and reaffirmed the earlier determination that the

Omaha National facility is not a branch under federal law.

Under 12 U. S. C. § 36(c) a national banking association may engage in branch banking only when, where and how state law would expressly authorize a state bank to do so. *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 260-62 (1966). It is established that what constitutes a "branch" is a question of federal law, not controlled by state law definitions, *First National Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *Driscoll v. Northwestern National Bank*, 484 F.2d 173, 175 (8th Cir. 1973), but the determination must be made on the facts of each case, not according to a fixed test. *North Davis Bank v. First National Bank*, 457 F.2d 820, 824 (10th Cir. 1972). The definition of "branch," governing national banks, contained in § 36(f), includes:

> [A]ny branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The Supreme Court has recognized that this circular definition "may not be a model of precision" and has added substance to it by observing that:

> [T]he term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises[.] (Emphasis in original.)

First National Bank v. Dickinson, supra at 135.

As this definition is phrased in the disjunctive, the offering of any of the three listed services at a location "apart from the chartered premises" will provide a basis for

finding that branch banking is taking place. Considered in light of this definition, the 18th and Douglas facility is definitely a branch unless it can be characterized as being "attached" to, rather than "apart from," the main bank.

The Supreme Court has held that in applying the statutory definition of "branch," equal recognition must be extended to the policy of maintaining "competitive equality" between the state and national banking systems insofar as branch banking is concerned. The preservation of competitive equality is the pervasive underlying principle of the McFadden Act. *First National Bank v. Walker Bank & Trust Co., supra* at 261. In this light, Chief Justice Burger has observed for the Court that:

> [W]hile Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster "competitive equality." * * * State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.
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> * * *
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> The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.
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> In short, the definition of "branch" in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.* (Citations and footnote omitted.)

First National Bank v. Dickinson, supra at 131, 133, 134.

The central issue in this case is whether Omaha National's 18th and Douglas facility has properly been characterized as an extension of the main bank and not a branch bank "apart from the chartered premises." To be sure, the Supreme Court's use of the phrase "apart from the chartered premises" was not intended to classify every free-standing facility as a branch. *Virginia ex rel. State Corporation Commission v. Farmers & Merchants Bank,* 380 F.Supp. 568, 572 (W.D.Va. 1974), *aff'd per curiam,* 515 F.2d 154 (4th Cir.), *cert. denied,* 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975) (No. 75-192). However, lack of physical connection to the main bank is obviously a necessary though not sufficient characteristic shared by all facilities "apart from the chartered premises."

If the instant facility is "apart from the chartered premises" so as to be a branch embraced by the rule of *First National Bank v. Dickinson, supra,* then Omaha National is engaging in branch banking in a manner exceeding that permitted Nebraska state banks. Each Nebraska bank, subject to geographic limits, is permitted to maintain only one "attached auxiliary teller office" and two "detached auxiliary teller offices." Neb. Rev. Stat. § 8-157.[3] Regulations promulgated by the Nebraska Department of Banking define attached and detached auxiliary teller offices as follows:

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3 The statute, Neb. Rev. Stat. § 8-157 (Supp. 1974), provides in part:

> (1) No bank shall maintain any branch bank and, except as provided in subsection (2) of this section, the general business of every bank shall be transacted at the place of business specified in its charter.

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(a) A *detached* auxiliary teller office contemplates the establishment of another banking facility which is physically removed and located in another area away from the main banking house and which is separated from the main banking house in such a way so as to not constitute a contiguous unit operation.

(b) An *attached* auxiliary teller office contemplates a physical connection, a constructed attachment whereby there exists a single, integrated banking operation at the main banking house, expanded to accommodate customers coming to the main banking house. *Connecting a main banking house to a detached facility by means of a system of pneumatic tubes and/or closed circuit television does not convert the detached facility into an attached facility.* (Emphasis added.)

Nebraska Department of Banking Reg. § 8-157-01 (1970).

The language of § 36(c) makes clear that Congress intended to allow state law to determine whether branch banking by a national bank in a given state will be permitted and, if so, the limits on branch units. While the language is somewhat ambiguous concerning the extent to

(2) With the approval of the director, (a) any bank may maintain an attached auxiliary teller office, and (b) any bank may establish and maintain not more than two detached auxiliary teller offices, to be used as motor vehicle and walkup off-street banking facilities, such offices to be within the corporate limits of the city in which such bank is located. Any bank that establishes and maintains two auxiliary teller offices shall locate one of such offices within three miles of the premises specified as its place of business in its charter. Neither shall be located within three hundred feet of another nonparticipating bank or within fifty feet of another auxiliary teller office. The services of such auxiliary teller offices whether attached or detached from the bank shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank. (Emphasis added.)

which state law should be used to *define* branch banking, the Supreme Court's recognition of Congress' paramount policy of fostering competitive equality in the McFadden Act mandates that, in determining whether a national bank facility is a branch, prime consideration must be given to whether a state bank would be allowed to maintain one like it in the circumstances. If the state branch would be prohibited, the facts calling for classification of the national bank facility as a mere "extension of the main bank," and not a branch, must be obvious and compelling to avoid what the Supreme Court condemned as restrictively applying the definition of "branch" in a manner frustrating congressional intent. *First National Bank v. Dickinson, supra* at 134.

The cases considering the factual question whether a given national bank facility is a "branch" have identified a number of factors to be assessed in making the determination.[4] They include (1) the distance separating the

4 The cases are collected and discussed in Virginia ex rel. State Corp. Comm. v. Farmers & Merchants Nat'l Bank, 380 F.Supp. 568, 572-74 (W.D.Va. 1974), aff'd per curiam, 515 F.2d 154 (4th Cir.), cert. denied, 44 U. S. L. W. 3205 (U. S. Oct. 6, 1975) (No. 75-192).

There, a detached drive-in facility located 200 feet and across the street from a branch office in a county adjoining that of the main bank, without even a pneumatic tube connection to the existing branch, was held not to be an additional "branch" under § 36 (f). The federal district court in Virginia was cautious to note that similar drive-in facilities, if physically attached to existing branches, were permitted by applicable state law and implied that state law would permit a state bank to do what the national bank was attempting to do. 380 F. Supp. at 573. Such is not the case here. Whereas in Farmers & Merchants the district court only assumed that state law definitions of "branch" were flexible enough to accommodate the unattached drive-in expansion as part of a state bank's existing branch (despite prior state administrative rulings apparently to the contrary), in the instant case it is clear that Nebras-

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main bank from the added facility; (2) the presence or absence of intervening structures; (3) the physical connection, if any, between the main bank and the facility; (4) the effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers); (5) the availability of other locations for attached expansion; and finally (6) the dependence of the facility upon the main bank in day-to-day banking operations. The Comptroller in the instant case recited a number of these factors in his final opinion concluding Omaha National's facility is not a branch and the District Court framed its analysis in the same manner.[5]

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ka law would not permit a state bank to do what Omaha National is attempting.

However, even without the apparently distinguishing fact that Virginia state law might permit the expansion, in our view the Farmers & Merchants decision impermissibly subordinated § 36(f)'s statutory definition of "branch" and underrated the influence of state law definitions of branching in favor of administrative fiat and judicially conceived criteria recited in the cases. To the extent the Farmers & Merchants court did so, we decline to follow it.

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5 The District Court noted that "[t]hough this explicitly is not an appeal from [the Comptroller's June 26, 1974] decision, the Court is in agreement with that adjudication." The Comptroller explained his criteria for decision as follows:

> [W]hether a particular structure to be constructed by a national bank in close proximity to an existing main office or branch is a separate "branch office" or simply an integral part of the existing structure, is an issue of Federal law which must be resolved in the first instance by this Office. 12 U.S.C. §§ 36(c) and (f). Resolution of this issue on any particular set of circumstances requires application of a number of basically factual criteria which have been administratively and judicially de-

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We have no quarrel with the use of such factors as an aid to the factfinder in analyzing the circumstances of a particular case, provided they do not overshadow application of the statutory definition of "branch" and the principle of competitive equality. However, in the instant case Omaha National, the Comptroller and the District Court have lost sight of the Supreme Court's definition of "branch bank" in *First National Bank v. Dickinson, supra* at 135, and disregarded the indispensible [*sic*] role state law must play in applying the federal definition of "branch" in order to maintain competitive equality. By force of the language of § 36(c) itself, the fact that a state bank would not be permitted to operate the challenged facility in addition to its other existing facilities, must take precedence as a decision criterion over the many administratively and judicially conceived factors discussed above. *See First National Bank v. Dickinson,*

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veloped over a number of years. Among the factors considered are distance from the existing site of the proposed site, intervening structures, physical connection, alternate choices, if any, for expansion of existing facilities, and impact of the proposed structure upon the balance of competition within the banking community. If, from an examination of all pertinent factors, no single one of which is controlling, it appears that the proposed structure will be so closely tied to an existing office as to be an integral part thereof and thus constitute a single banking operation, the Comptroller's Office must conclude that such a proposed addition is merely an extension of the existing bank premises and not a branch separate and apart therefrom.

As this is not an appeal from the Comptroller's ruling, we are not bound by the narrow "arbitrary and capricious" standard of review. Cf. Sterling National Bank v. Camp, 431 F.2d 514, 516 (5th Cir. 1970), cert. denied, 401 U.S. 925 (1971); Dunn v. First National Bank, 345 F.Supp. 853, 857 (N.D.Ga. 1972). See also Mid-West Nat'l Bank v. Comptroller, 296 F.Supp. 1223, 1226 (N.D.Ill. 1968).

supra; First National Bank v. Walker Bank & Trust Co., supra; Driscoll v. Northwestern National Bank, supra.

The District Court gave what it termed "special consideration" to Nebraska banking regulation § 8-157-01(b), defining "attached auxiliary teller" offices. However, the court concluded that the integration of operation existing between Omaha National's main bank and the facility, accommodating customers coming to the main bank, presents a unique circumstance "not contemplated by the regulation." While this court ordinarily gives deference to a district court's interpretation of state law, *Luke v. American Family Mutual Insurance Co.*, 476 F.2d 1015, 1019 & n. 6 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973); *Indemnity Insurance Co. v. Pioneer Valley Savings Bank*, 343 F.2d 634, 644-45 (8th Cir. 1965), no such deference need be given if, as here, the court refuses to invoke state law where applicable. The District Court did not conclude whether in its view a state bank would be permitted to operate similar facilities in the same circumstances as Omaha National's; but our reading of the Nebraska statute and regulations make it abundantly clear that a state bank would not be permitted to do so, and that the instant facility, on the facts the District Court found to exist, is a "branch" under federal law.

After construction of the new facility was challenged, Omaha National contacted Henry E. Ley, the Nebraska Director of Banking, and solicited an opinion from him as to the legality of the challenged facility under state law. Although the Director had informally, prior to the construction, given an opinion that the facility as explained to him would be merely "a continuation of the operation of Omaha National Bank in its main office,"

the Director, upon further investigation, later determined that the facility could "in no way be considered attached to that part of the [Woodmen Tower] building housing the Omaha National Bank." In his deposition admitted in evidence at trial, Director Ley acknowledged his change of opinion, the reason therefor, and again concluded that the facility is not "attached." He further testified that he "would not allow a state bank to operate these three facilities as they are set up at the present time."

While the state director's view is not dispositive, it is certainly illuminating on the extent to which a state bank could extend its operation under Nebraska law; and the same result should ensue with a national bank if full credit and meaning is to be given to the doctrine of competitive equality legislated in § 36. It definitely appears that Omaha National has extended its operation beyond permissible bounds. The District Court's finding that the 18th and Douglas facility is an integral extension of the main bank and not a branch bank must be set aside as clearly erroneous factually and as induced by an erroneous view of the law defining a branch bank. *Lewis v. Super Valu Stores, Inc.*, 364 F.2d 555, 556 (8th Cir. 1966); *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F.2d 416, 418 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944).

The ultimate issue in the instant case is not simply a factual one. It involves application of the federal law defining branch banking. Only by overlooking the definition of "branch" contained in § 36(f), construed by the Supreme Court in *First National Bank v. Dickinson, supra* at 135, and by wholly ignoring Nebraska's branch banking proscription made directly relevant by the policy of competitive equality embodied in § 36(c), could it be

concluded that the 18th and Douglas facility is not a branch. The question in this case is not whether Omaha National acted reasonably or prudently in a business sense in moving the service of its previous attached Brandeis drive-in facility to 18th and Douglas or whether doing so in lieu of other alternatives was least unsettling to the balance of competition,[6] but simply whether the facility constitutes a federally defined "branch" carrying

6 In the summer of 1973, when Omaha National applied to the Comptroller of the Currency for authority to construct the new facility at 18th and Douglas Streets, it was operating two downtown banking offices in addition to its main banking house. One was an attached drive-in facility located in the adjoining Brandeis Parking Garage; the second was a detached drive-in/walk-up office located in the free-standing "cupcake" shaped building located at 19th and Dodge Streets, three blocks northwest of the main bank. However, by January, 1974, Omaha National had closed its two downtown facilities and replaced them with the 18th and Douglas facility, which was approximately halfway between the two. Two outlying branches at 42nd and Grover and 108th and "M" Streets were also established, only one of which is permissible under the two branch limitation.

This establishment of an additional outlying branch had a substantial impact on the balance of banking competition. Though the Comptroller concluded that "whatever changes have taken place in the banking community in Omaha, as a result of the establishment of ONB's new [facility] at Douglas and 18th Streets, [were] * * * exceptionally minor," the Comptroller's scope of inquiry on that issue appears to have been unjustifiably restricted to the downtown Omaha banking community. Irrefragably, the introduction of a new branch in an outlying area within the city limits had a significant impact on the balance of banking competition.

Thus, in effect, Omaha National has combined the operation of two previous downtown facilities (one detached and one attached) into a single (detached) downtown branch at 18th and Douglas Streets. By contending that this new detached downtown office is no more than an extension of the main bank premises, Omaha National is attempting to fit its three branch (four location) operation into the state's two branch limitation. Avoidance of the state's branching limitation by a national bank in this manner, however, conflicts directly with the doctrine of competitive equality and should not be permitted.

Omaha National beyond the limits of branching permitted state banks.

The term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises. *First National Bank v. Dickinson, supra* at 135. It is undisputed that deposits are received and checks paid at the 18th and Douglas facility, and Omaha National concedes that loan applications are accepted there as well.[7] Further, it cannot be seriously disputed that a free-standing facility located around the corner, one block up and across the street from the main bank's south entrance on Farnam Street, even if connected by a pneumatic tube, is one located "apart from the chartered premises" as a matter of law. The bank's main entrance is yet further from the facility, around two corners on 17th Street to the east. There is no west entrance directly into the main bank from 18th Street for the reason that the bank on the ground floor is located only in the east half of the Woodman [*sic*] Tower lobby.

Thus, the characterization of the 18th and Douglas facility as "an integrated extension of the main bank," without reference to the Supreme Court's construction of the term "branch bank" under § 36 (f) or regard for the state's characterization of such a facility as "detached,"

7 The argument that this facility has no safe deposit boxes, trust department or international banking operation is, to say the least, irrelevant. State banks could not offer such services at auxiliary teller offices under present Nebraska law. As noted, Neb. Rev. Stat. § 8-157 limits the services offerable in attached or detached state bank auxiliary teller offices "to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments * * *."

was induced by an erroneous view of the law and must be set aside.

In view of our disposition of the plaintiffs' substantive claim, we do not rule on their procedural claims that the court erred in limiting the scope of discovery and in excluding and receiving various matters in evidence.

The judgment of the District Court is reversed and the case remanded for entry of a judgment that Omaha National is operating three branch banks within the meaning of 12 U. S. C. § 36 and providing appropriate injunctive relief consistent with this opinion.

LAY, Circuit Judge, Concurring.

I concur in the result. However, I cannot accept the rationale offered by the majority. The opinion in my judgment misconstrues the deference due state law under the policy of competitive equality and thereby justifies use of state law to define a federal branch bank. This allows "the tail to wag the dog." The definition of a "branch" bank is solely a question of federal law. *First National Bank v. Dickinson,* 396 U. S. 122, 134-36 (1969); *Driscoll v. Northwestern National Bank,* 484 F. 2d 173, 175 (8th Cir. 1973).

The McFadden Act, 12 U. S. C. § 36, sets out the concept of competitive equality:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* and (2) at any point

> within the State in which said association is situated, *if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively* and not merely by implication or recognition, and *subject to the restrictions as to location imposed by the law of the State on State banks.*

12 U. S. C. § 36 (c) (my emphasis).

As the Supreme Court discussed in *Dickinson*:

> [W]hile Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster "competitive equality." *Walker Bank,* 385 U. S., at 261. State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.
>
> . . . .
>
> Admittedly, state law comes into play in deciding *how, where, and when* branch banks may be operated, *Walker Bank, supra,* for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it.

396 U. S. at 131, 133 (my emphasis).

Although state law comes into play in deciding "how, where and when" a branch may operate, Congress intended federal law to determine "what" is a branch. With this in mind I fail to see the relevance of the testimony of the State Banking Director or of state law in deciding whether or not the drive-in facility is a branch. Section 36 (f) simply says:

> The term "branch" as used in this section shall be held to include any branch bank, branch office,

> branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U. S. C. § 36 (f).

The evidence is undisputed that at the facility in question "deposits are received" and "checks paid." The only remaining issue under the test of *Dickinson* is whether the bank is "apart from the chartered premises." *Dickinson, supra* at 135. The physical facts clearly support the finding that the drive-in facility is "apart from the chartered premises." Reference to state law merely serves to corroborate this determination. Under Nebraska Department of Banking Regulations, § 85-157-01 [*sic*] the facility is considered "detached." However, regardless of this regulation, the facility is clearly a "branch bank" under federal law.

WEBSTER, Circuit Judge, joined by HENLEY, Circuit Judge, Dissenting.

I respectfully dissent. This case was in my view correctly decided in the original panel opinion, authored by Judge Devitt,[1] which affirmed the District Court's findings under the clearly erroneous standard of review. Our holding today undercuts *First National Bank v. Dickinson,* 396 U. S. 122 (1969), by assigning to state law an "indispensible [*sic*] role" in the determination of what is a "branch" of a national bank. Majority Opinion at 11-12. Judge Lay, in his separate concurring opinion, shares my view that the definition of a branch bank is solely a

1 The Honorable Edward J. Devitt, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

question of federal law and that state law is irrelevant to the issue. I cannot agree with him, however, that the Omaha National Bank facility is "clearly a 'branch bank' under federal law" or that the District Court's holding to the contrary was clearly erroneous.

If, as the majority opinion seems to imply,[2] the existence of a state statute or regulation limiting or prohibiting certain types of activities may operate to pre-empt the determination by a federal court of whether a specific facility is or is not a branch, then the established rule that branch banks are defined under federal law is mere lip service. I cannot accept such a circular result.

The federal definition of branch banks, set forth in 12 U. S. C. § 36 (f), provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The Supreme Court elaborated upon this definition in *First National Bank v. Dickinson, supra,* 396 U. S. at 135, where it said:

> [T]he term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises * * *. (emphasis original.)

The Supreme Court has made it abundantly clear that while a state may limit or prohibit branch banking within

2 The majority opinion assigns state law an "indispensible [sic] role" in this process. See Majority Opinion at 11-12.

its borders it has no role to play in determining what is or is not a "branch" of a national bank:

> We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36 (f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated * * * for in § 36 (c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch." (citation and footnote omitted)

First National Bank v. Dickinson, supra, 396 U. S. at 133-34.

Once a facility of a national bank has been determined to be a "branch" under federal law, then state law may govern the "how, where, and when" of its operation. That is the extent of competitive equality. When Congress undertook to include a general definition of "branch" in the McFadden Act, it could hardly have intended that the definition should have one meaning in Nebraska and another meaning in Virginia. State law is, therefore, irrelevant in the determination of what is or is not a "branch" of a national bank.[3]

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3 Judge Lay, while acknowledging that federal law controls the definition, would permit reference to the Nebraska law to "corroborate" such determination. This suggests an indirect influence which I think is impermissible.

The issue before this Court is whether the District Court was clearly erroneous in determining that the facility was not a branch bank. *See* Fed. R. Civ. P. 52 (a). A number of factors have been recognized as being relevant to the issue of whether a facility is a branch. *See* Majority Opinion at 9-10. These include:

> (1) the distance separating the main bank from the added facility; (2) the presence or absence of intervening structures; (3) the physical connection, if any, between the main bank and the facility; (4) the effect upon the balance of competition (that is, whether the facility expands in a material way customer access to banking services in a location not previously served so as to give a material competitive advantage in securing customers); (5) the availability of other locations for attached expansion; and finally (6) the dependence of the facility upon the main bank in day-to-day banking operations.

Id. See also Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank, 380 F. Supp. 568, 572-74 (W. D. Va. 1974), *aff'd per curiam,* 515 F. 2d 154 (4th Cir.), *cert. denied,* 44 U. S. L. W. 3205 (U. S. Oct. 6, 1975).

Because the evidence is undisputed that deposits are received and checks are paid at the facility in question, the key issue under *Dickinson* is whether the facility is "apart from the chartered premises". In *Virginia ex rel. State Corporation Commission v. Farmers and Merchants National Bank, supra,* the district court applied these various factors in determining whether the questioned facility, which was 200 feet from an existing bank, was "apart from the chartered premises". After carefully evaluating the unavailability of feasible alternatives which

would have been closer to the main bank and the fact that the new facility did not materially increase the region of customer service so as to impair the existing competitive balance, the court concluded that the facility was not "apart from the chartered premises" and was thus not a branch bank under the federal definition of that term.

In this case, the factors considered by the District Court included (1) the distance between the main bank and the challenged facility; (2) the regular utilization of a pneumatic tube system between the two facilities; (3) the unavailability of feasible alternate sites for an attached auxiliary teller office; (4) the high degree of integration of the operations of the main bank and the facility; (5) the absence of intervening physical structures; and (6) the absence of an effect upon the balance of competition.[4] After considering "all of the relevant factors and circumstances peculiar to this case", including the Comptroller's investigation and ruling, the court concluded that the Omaha National Bank facility was not a branch bank.

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4 In evaluating these factors, the District Court said:

Even though the distance between the bank's facilities in the Woodmen Tower and the 18th & Douglas facility, including the width of 18th Street, which is a moderately traveled truncated street, is 102 feet (measured in a straight line diagonally from the northwest corner of the Woodmen Tower Building to the southeast corner of the property upon which the walk-in/drive-in facility is located), the integration of operation between the main bank and this auxiliary teller office under the geographical restrictions exhibited in this case, coincident with the regular utilization of the functional underground pneumatic tube system, warrants this Court in finding that the facility in issue is physically and operationally attached. * * * The positioning of a night depository on the main floor of the Woodmen Tower at a substantial distance to the west of the main bank's premises for customer service and the utilization of several entire floors above the main floor of the Woodmen Tower Building, which abuts 18th Street on the west, exhibits the pervading presence of the operations of the Omaha National Bank

(Continued on next page)

on the southern half of the block contiguous to Farnam Street from 17th to 18th Streets.

* * *

This Court has scrutinized the move of the Omaha National Bank from its prior attached facility immediately to the north of its main bank premises at 17th & Farnam. The reasons for the move are reasonable and compelling. The severe traffic congestion that prevailed at the entrance and exits of this facility several hours a day demanded either a structural change or a move. (A mareria1 factor contributing to this congestion was the uncontemplated alteration of the direction of the one-way traffic on 17th Street from northbound to southbound subsequent to the erection of this edifice.) Since this facility was entrenched within the ground floor of approximately an eight story parking lot, the options for structural modification when considering the magnitude of the building's pillars within the ground floor and at the outlets of ingress and egress were neither physically nor financially feasible. The carbon monoxide buildup from the stacked automobiles on the tunneled approach ramp to the teller windows was a substantial safety hazard also impelling a change.

* * *

The facts in the instant case support the finding that the purpose of the contested facility was an adjunct or annex to the existing main bank. A substantial part of the "deposited" business from the 18th & Douglas facility was routed to various sectors within the main bank where it was processed. Maintenance of cash at this facility was solely for operating needs and was contained within a detached, reach-in cash chest of one inch steel plate within six inches of factory poured concrete. The security system for this facility was monitored within the main bank rather than at the Police Station as were the systems at the detached facilities. Though the initial management at this facility was somewhat autonomous when this suit was filed, the Court has not deciphered the complicated and enmeshed organizational structure of this integrated operation to be either an overshadowing or preponderant factor. Rather, the functioning of this facility evinces its inherent characteristics of a dependent auxiliary teller office. The

(Continued on the next page)

Competitive equality does not mean that there will not be some differences from time to time between what is or is not a "branch" as determined under federal law and what a particular state considers a branch to be. Such differences are inevitable in a federal system. The federal standards were applied in this case and the facility was determined not to be a branch. There was substantial evidence to support the District Court's finding that "[t]he 18th & Douglas facility did not expand in a material way customer access in a geographical area not previously served," and that the facility was not so situated physically "as to give the Omaha National Bank a material competitive advantage in securing customers." The ultimate finding that the facility was "an integrated extension of the main bank" and not a branch under federal law was not clearly erroneous.

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operational authority of the 18th & Douglas facility emanates from and is actively supervised by the officers located within the main bank.

* * *

The 18th & Douglas facility did not expand in a material way customer access in a geographical area not previously served, nor is the facility so situated physically as to give The Omaha National Bank a material competitive advantage in securing customers. Only customer convenience and the safety of the customer and local traffic, both pedestrian and automobile, have been affected. The customer must still walk or drive to approximately the same area.

APPENDIX B

12 U. S. C. § 36

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

. . .

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Ex-

cept as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

. . .

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

8-157 NEB. REV. STAT. (1975 Supp.)

8-157. Branch banks prohibited; auxiliary teller offices authorized; manned or unmanned electronic satellite facilities; user banks; operation of facilities; nondiscriminating basis; combination bank; director to investigate alleged discrimination; procedure; not applicable to nonbank institutions; clearinghouse transactions not prohibited. (1) No bank shall maintain any branch bank and, except as provided in subsection (2) or subsections (3) to (9) of this section, the general business of every bank shall be transacted at the place of business specified in its charter.

(2) With the approval of the director, (a) any bank may maintain an attached auxiliary teller office, and (b) any bank may establish and maintain not more than two detached auxiliary teller offices, to be used as motor vehicle and walkup off-street banking facilities, such offices to be within the corporate limits of the city in which such bank is located. Any bank that establishes and maintains two auxiliary teller offices shall locate one of such offices within three miles of the premises specified as its place of business in its charter. Neither shall be located within three hundred feet of another nonparticipating bank or within fifty feet of another auxiliary teller office. The services of such auxiliary teller offices whether attached to or detached from the bank shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank.

. . .

REG. 8-157-01. Attached and detached auxiliary teller offices. (a) A detached auxiliary teller office contemplates the establishment of another banking facility which is physically removed and located in another area away from the main banking house and which is separated from the main banking house in such a way so as to not constitute a contiguous unit operation.

(b) An attached auxiliary teller office contemplates a physical connection, a constructed attachment whereby there exists a single, integrated banking operation at the main banking house, expanded to accommodate customers coming to the main banking house. Connecting a main banking house to a detached facility by means of a system of pneumatic tubes and/or closed circuit television does not convert the detached facility to an attached facility.

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

The question before the Trial Court and the Court of Appeals was not a simple dispute over the operation of the single detached facility at 18th and Douglas Streets, Omaha, Nebraska. The question was whether or not Petitioner, Omaha National Bank, in operating a main bank plus three separate physically detached and removed facilities was in violation of Nebraska's law that restricted branch banking to the main bank and two detached facilities. (Petition for writ, App. A, 38a, 39a.)

The action was not one to enjoin the 18th and Douglas Street detached facility operation, but it was one to enjoin the operation of three detached facilities where state chartered banks could operate only two such facilities. The choice of which of the three operations should be closed to comply with Nebraska branching restrictions was left with Petitioner, Omaha National Bank. (Petition for writ, App. A, 54a.)

When Omaha National Bank moved its main bank to the Woodmen Tower building in 1970, it was operating and for some time continued to operate two near-by facilities in addition to the main bank, i. e., the "Brandeis" parking garage facility (an attached facility under Nebraska law) and the "Cupcake" facility (a detached facility approximately three blocks removed from the new main bank quarters). Such operations conformed to Nebraska laws with respect to attached and detached facilities.

In 1973 and 1974, Omaha National Bank built and opened three new detached facilities, and closed its Brandeis and Cupcake facilities. Two of the three new detached facilities were located in suburban areas of Omaha, several miles from the main banking quarters, thereby extending and enlarging the geographic competition greatly and materially. Such suburban operations are in the same banking areas where several of the plaintiff banks were and are doing business and are now in competition with plaintiffs' banks. (Petition for writ, App. A, 52a, F. N. 6.)

All three of Petitioner's new detached facilities render substantially all banking services that are offered

by bank branches and by suburban unit banks. (Petition for writ, App. A, 42a.)

There is no similarity of operation between Omaha National Bank's Brandeis facility (attached) and its new detached facility at 18th and Douglas Streets. The former was confined to a multi-drive-in facility, primarily for making deposits and cashing checks. The new 18th and Douglas Street facility (for all practical purposes) is a full bank operation.

Petitioner, Omaha National Bank, is the largest bank in the State of Nebraska, and controls approximately 31% of all of the bank deposits in the City of Omaha.

When it operates three detached facilities, and state banks are allowed only two under the Nebraska law, Petitioner has a great competitive advantage over state banks.

The competitive advantage is measured by Petitioner's total operation, not that of the single facility at 18th and Douglas Streets.

The Comptroller of the Currency made its determination ex parte with respect to the question of whether or not the 18th and Douglas Street facility was a branch. It refused an adversary hearing as directed by the Trial Court. (Petition for writ, App. A, 42a, 43a.)

The meaningful distance between the operations of the Omaha National Bank's main bank and its 18th and Douglas Street facility is not 102 feet, but is in excess of 500 feet. (Petition for writ, App. A, 53a; Fig. 1, App. A, 41a.)

REASONS FOR DENYING THE WRIT

I.

The decision of the Court of Appeals is not in conflict with the decision of the Fourth Circuit Court of Appeals in the Farmers & Merchants case.[1]

We may agree that both decisions address the same issue, i.e., whether a detached facility is or is not a "branch" under 12 U.S.C. § 36, but this is the total extent of agreement. The case at bar is wholly different and distinguishable from the *Farmers & Merchants* case under every applicable test, and in no way may it reasonably be said that the decisions are in conflict one with the other.

The court in the *Farmers & Merchants* case was careful to expressly recognize that each case must be decided on its own facts in determining what is or what is not a branch under the federal law, and in doing so employed the following language:

> "The court is well aware of the problems inherent in its refusal to adopt the simple expedient of labeling all free-standing structures as separate 'branches'. The court is comforted, however, in its knowledge that a case by case consideration will do greater justice and better comport with legislative intent and judicial sense." (Page 9, unpublished opinion of district ct.)

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1 Commonwealth of Virginia v. Farmers & Merchants National Bank, 480 F. Supp. 568 (W.D. Va. 1974), aff'd per curiam, 515 F.2d 154 (4th Cir. 1975), cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975).

To the same effect is the holding of the appellate court in the case at bar, citing *North Davis Bank v. First National Bank*, 457 F. 2d 820, 824 (10th Cir. 1972). (Petition for writ, App. A, 43a.)

A comparison of the facts in the case at bar with the facts in *Farmers & Merchants* case readily distinguishes them and illustrates a complete absence of conflicting decisions between the two Appellate Courts.

1. The *Farmers & Merchants* case involved but one small drive-in facility. The bank had no drive-in, not a single drive-in window, and had it been able to attach such a window to its existing building it would have sufficed. But compare the Omaha National Bank's branching activities. The Omaha National Bank was not without a drive-in facility, for it had two, but closed both of them and built three new ones and greatly expanded its competitive branching by going into the suburbs with two of them. The facility in the *Farmers & Merchants* case did not go out into the far reaches of the city with other branches and did not conduct full branch or unit bank operations in its new drive-in facility.

2. In the *Farmers & Merchants* case, the court found that the Farmers & Merchants Bank made no attempt to expand in a material way the geographical region served by the branch office. The case at bar embraces a broad spectrum of multiple operations on a preconceived, deliberate and determined effort by Petitioner to expand branching activities beyond what state banks could do, and thereby obtain a highly advantageous competitive position. Petitioner expanded its competitive branch activities from its central city operations to the suburbs by

constructing, opening and operating three new, large, full service facilities, offering all services common to suburban unit banks or branches. The geographic expansion was major, and gave the Omaha National Bank great and damaging competitive advantage.

In the case at bar, the Omaha National Bank has been involved in a "clear, systematic attempt to secure branch banking privileges prohibited under the state law", a course of conduct considered and frowned upon by the United States Supreme Court in the *Dickinson* case.[2] The court, in the *Farmers & Merchants National Bank* case, in distinguishing it from the *Dickinson* case, said that the Farmers & Merchants National Bank was not so engaged. (380 F. Supp. 568, 573.)

3. In *Farmers & Merchants National Bank* case, the court said:

> ". . . The question reduces to whether a bank shall be placed at a possibly permanent competitive disadvantage in meeting the needs, preferences, and modern banking habits of its customers because of its physical location, established in most instances long before such needs are apparent." (380 F. Supp. 568, 573.)

The question in the case at bar reduces to whether the Omaha National Bank, Petitioner, shall have a formidable permanent competitive advantage over state banks by being able to operate three detached facilities whereas state banks could not do likewise, but could operate only two out of the three.

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2 **First National Bank v. Dickinson**, 396 U.S. 122, 138 (1969).

4. The operations of its three detached facilities by Omaha National Bank are substantially the same as the operations of branches or unit banks, whereas the operation of the drive-in facility by Farmers & Merchants National Bank was operated as an adjunct or annex to the existing branch office. (380 F. Supp. 568, 573.)

The Appellate Court recites the 18th and Douglas Street operations of Omaha National Bank (Petition for writ, App. A, 42a), viz:

> "The 18th and Douglas Street facility is a detached office facility with ten drive-in and six walk-in teller stations. It is a custom-built, free-standing building unattached to the main bank. There is a pneumatic tube connection between the two buildings used by the bank to transport currency and papers. The facility is separately staffed, has a separate telephone listing, offers most of the customary banking services, accepts deposits, cashes checks, makes non-commercial loans and maintains somewhat longer public hours than does the main bank. It does not offer safe deposit boxes, trust services or, according to its brief, international banking or commercial loans. Its net deposits are transported to the main bank by armored car."

It is obvious that the Omaha National Bank facility at 18th and Douglas Streets is functioning in the same way as branch banks generally function, and falls within the language of the court in *Farmers & Merchants National Bank:*

> "If a facility illegally functions as a 'branch', the intended purpose of the branch cannot vitiate the effect or otherwise justify the operation of that facility." (380 F. Supp. 568, 573.)

5. At page 11, Petition for writ, Petitioner takes issue with the Appellate Court's footnote 4, Petition for Writ, App. A, 47a, respecting the court's observations in *Farmers & Merchants National Bank* case in respect of the branching laws of the State of Virginia (saying that the "attempted distinction" between the laws of the two states "will not stand scrutiny").

Initially, we suggest that the criticism is of no meaningful significance with respect to Petitioner's contention that there is a conflict in the decisions of the Fourth and Eighth Circuit Courts of Appeal.

Additionally, however, we submit that the Appellate Court's observations are correct in all respects. In *Farmers & Merchants National Bank* case, the court said:

> "In *Dickinson, supra,* on which plaintiff heavily relies, the court considered the case of an armored car mobile service center. That facility clearly fell within the language as well as the spirit of 12 U. S. C. § 36 (f). As the Court recognized, that case involved a clear, systematic attempt to secure branch banking privileges prohibited under state law. Id. at 138. Such is not the situation in this case. Defendant erected its facility as close to its existing bank as conditions permitted. *Such drive-in facilities are permitted under state law,* and had defendant been benefited by the fortuity of having located where a drive-in window could have been physically attached to the existing office, the operation of such a facility would not have been challenged." *Commonwealth of Virginia v. Farmers & Merchants National Bank,* 480 F. Supp. 568, 573. (Emphasis ours.)

And, in the same case, the United States Court of Appeals in its per curiam opinion, 515 F. 2d 154, confirms in the following language:

> ". . .; and, applying federal law, it concluded further that the drive-in facility which was the subject of litigation was not a 'branch' but an extension of an existing banking office, the maintenance of which was authorized under both state and federal law."

6. That the court in the *Farmers & Merchants National Bank* case held the single drive-in facility not to be a "branch" under the facts before the court on a summary judgment proceeding, and that the court in the case at bar held all three detached facilities to be "branches", does not in any conceivable manner demonstrate or establish or even suggest that the decision of the case at bar by the United States Court of Appeals for the Eighth Circuit is in conflict with the decision by the United States Court of Appeals for the Fourth Circuit in *Farmers & Merchants National Bank.*

II. and III.

The decision of the Court of Appeals is not in conflict with the decision in either the Dickinson case (supra) or Walker case,[3] but is consistent with and compelled by each of them.

The Appellate Court expressly follows the rule laid down in the *Dickinson* case that the question of "what constitutes a 'branch' is a question of federal law, not controlled by state law definition," saying:

> "Under 12 U. S. C. § 36 (c) a national banking association may engage in branch banking only when, where and how state law would expressly authorize

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3 First National Bank v. Walker Bank & Trust Company, 385 U. S. 252 (1966).

a state bank to do so. *First National Bank v. Walker Bank & Trust Co.*, 385 U. S. 252, 260-62 (1966). It is established that what constitutes a 'branch' is a question of federal law, not controlled by state law definitions, *First National Bank v. Dickinson*, 396 U. S. 122, 133 (1969); *Driscoll v. Northwestern National Bank*, 484 F. 2d 173, 175 (8th Cir. 1973), but the determination must be made on the facts of each case, not according to a fixed test. *North Davis Bank v. First National Bank*, 457 F. 2d 820, 824 (10th Cir. 1972)." (Petition for Writ, App. A, 43a.)

As observed by the United States Supreme Court and the Appellate Court (Petition for Writ, App. A, 44a) the Appellate Court is called upon to construe the definition and apply it with respect to specific facts in the case. In doing so, the Appellate Court quoted, relied upon, and followed the guidelines laid down by the U. S. Supreme Court in both the *Walker* and *Dickinson* cases, viz.:

> "The Supreme Court has held that in applying the statutory definition of 'branch,' equal recognition must be extended to the policy of maintaining 'competitive equality' between the state and national banking systems insofar as branch banking is concerned. The preservation of competitive equality is the pervasive underlying principle of the McFadden Act. *First National Bank v. Walker Bank & Truct Co., supra* at 261. In this light, Chief Justice Burger has observed for the court that:
>
> > "[W]hile Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster 'competitive equality.' * * * State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.
> >
> > * * *

> > "The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation.
> >
> > * * *
> >
> > "In short, the definition of 'branch' in § 36 (f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*" (Citations and footnote omitted.)

First National Bank v. Dickinson, supra at 131, 133, 134.

If the McFadden Act (12 U. S. C. 36) is to have any meaning, it must not be construed so as to "frustrate the Congressional intent" which gave rise to the federal enactment.

To apply the principle of "competitive equality", the court must know and consider what a state chartered bank may do under a given set of facts and circumstances and pursuant to the state's branching laws.

Petitioner's Reason II for granting the writ (Petition for Writ, 12) is misleading in that it suggests that the Appellate Court assigns state law and regulations an "indispensable" role in *determining* whether a facility is a branch, and then endeavors to support the reason by lifting only a few lines of the Appellate Court's opinion (Petition for Writ, 13).

To avoid an erroneous conclusion by reading a few lines out of context, we quote from the opinion of the Appellate Court (Petition for Writ, App. A, 49a, 50a):

"We have no quarrel with the use of such factors as an aid to the factfinder in analyzing the circumstances of a particular case, provided they do not overshadow application of the statutory definition of 'branch' and the principle of competitive equality. However, in the instant case Omaha National, the Comptroller and the District Court have lost sight of the Supreme Court's definition of 'branch bank' in *First National Bank v. Dickinson, supra* at 135, and disregarded the indispensible [*sic*] role state law must play in applying the federal definition of 'branch' in order to maintain competitive equality. By force of the language of § 36 (c) itself, the fact that a state bank would not be permitted to operate the challenged facility in addition to its other existing facilities, must take precedence as a decision criterion over the many administratively and judicially conceived factors discussed above. *See First National Bank v. Dickinson, supra; First National Bank v. Walker Bank & Trust Co., supra; Driscoll v. Northwestern National Bank, supra.*"

The Appellate Court did *not* "assign state laws and regulations an 'indispensable' role in *determining* whether a facility of a national bank is a 'branch'," but correctly observed that, in order to maintain competitive equality, state law may not be disregarded in *applying* the federal definition of "branch".

There is no way to measure "competitive equality" and give effect to the doctrine of competitive equality mandated by the United States Supreme Court in the *Walker* and *Dickinson* cases, except by recognizing what state chartered banks may do under like circumstances. *What a state chartered bank may do is determined by*

the laws and regulations of the state, and to that extent, the laws and regulations have an "indispensable" place.

It is submitted that the following excerpt from the Appellate Court's opinion (Petition for Writ, App. A, 46a, 47a, 48a) is correct under and consistent with the holdings of the U. S. Supreme Court under the *Walker* and *Dickinson* cases:

> "The language of § 36 (c) makes clear that Congress intended to allow state law to determine whether branch banking by a national bank in a given state will be permitted and, if so, the limits on branch units. While the language is somewhat ambiguous concerning the extent to which state law should be used to *define* branch banking, the Supreme Court's recognition of Congress' paramount policy of fostering competitive equality in the McFadden Act mandates that, in determining whether a national bank facility is a branch, prime consideration must be given to whether a state bank would be allowed to maintain one like it in the circumstances. If the state branch would be prohibited, the facts calling for classification of the national bank facility as a mere 'extension of the main bank,' and not a branch, must be obvious and compelling to avoid what the Supreme Court condemned as restrictively applying the definition of 'branch' in a manner frustrating congressional intent. *First National Bank v. Dickinson, supra* at 134.
>
> "The District Court did not conclude whether in its view a state bank would be permitted to operate similar facilities in the same circumstances as Omaha National's; but our reading of the Nebraska statute and regulations make it abundantly clear that a state bank would not be permitted to do so, and that the instant facility, on the facts the District Court found to exist, is a 'branch' under federal law."

IV.

The decision of the Court of Appeals, along with the decisions of the Supreme Court in the Walker and Dickinson cases, clearly points the direction and enunciates clear and workable guidelines for the Comptroller of the Currency for national banks and State Bank Administrators for state banks to follow and will perpetuate, not destroy, the dual system of banking, the preservation of which was at the root of the McFadden Act.

The undisputed fact in the case at bar is that the Omaha National Bank is operating three detached facilities under circumstances where a state chartered bank can operate only two (Petition for writ, App. A, 50a); and also that all three function as branches or unit banks. To permit this unequal treatment between a national and state bank would be to render the McFadden Act meaningless. The congressional intent to assure competitive equality certainly would be thwarted and frustrated in contravention of the McFadden Act and the rules laid down in both the *Walker* and *Dickinson* cases.

The competitive edge to national banks flowing therefrom would not only damage but would destroy the dual system of banking which was sought to be protected by the McFadden Act.

The decision of the Appellate Court in the case at bar recognizes and follows the fundamental doctrines laid down by the U. S. Supreme Court in the *Walker* and *Dickinson* cases and articulates the questions and guidelines with meaningful clarity.

The decision of the Appellate Court in the case at bar, along with the decisions of the U. S. Supreme Court in the *Walker* and *Dickinson* cases, point the direction and chart the course for national and state bank administrators, and will be most helpful and useful guidelines to the banking industry.

There is no argument that the threshold question of whether a facility of a national bank is a "branch" must be decided under federal law. The rule was clearly laid down by the United States Supreme Court, Chief Justice Burger, in the *Dickinson* case. The Appellate Court in the case at bar just as clearly recognized the rule and followed it without deviation.

———o———

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

PETITIONER'S MEMORANDUM REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Because it attempts to inject a new issue into this application for review—the totality of Petitioner's banking operations in the city of Omaha—Respondents' brief requires a reply.

The expansion of Petitioner's banking operations in Omaha between 1969 and 1974 can be properly understood only in the context of the changes in Nebraska's branch banking laws during the same period. Respondents have failed to supply the Court with this context, and their argument is therefore misleading.

In 1969 and for several years prior thereto, Nebraska branch banking law permitted a bank to have, in addition to its main bank, one attached facility and one detached facility, provided that the detached facility was within 2600 feet of the main bank. Sec. 8-157, Neb. Rev. Stat. (1963 Supp.), App. C, *infra*, p. 1c. In that statutory setting, Petitioner operated its main bank in the Omaha Building at 17th and Farnam Streets; the Brandeis facility across the street from the main bank, at 17th and Douglas Streets; and the so-called "Cupcake" facility, a branch bank three or four blocks distant from the main bank, but within the 2600 foot limit.

As stated in the Petition (p. 6), the Brandeis facility was in exactly the same geographical relationship to the main bank in 1969 as the contested 18th and Douglas facility is to Petitioner's present main bank in Woodmen Tower (Petition, Fig. 1, p. 5), and no claim was ever made that the Brandeis facility was a branch bank.

Contrary to the statements contained in Respondents' brief, no meaningful distinction can be made between the Brandeis and the 18th and Douglas facilities, in terms of their functional relationship to Petitioner's main bank. The trial record shows that for many years the Brandeis facility had walk-in facilities (later voluntarily closed by Petitioner), as does the 18th and Douglas facility. The Brandeis facility also had five drive-in units, whereas the 18th and Douglas facility has ten.

Petitioner's relocation of its main bank in Woodmen Tower in 1970 had the entirely coincidental effect of bringing the main bank into closer proximity to the Brandeis facility.

In 1973, the Nebraska Legislature amended the branch banking law in two respects material to this case. First, it increased from one to two the number of permissible detached facilities. Second, it liberalized the distance limitations upon detached facilities, by permitting one to be located within three miles of the main bank, and the other at any location (without distance restriction) within the city limits. Legislative Bill 312, Neb. Legislature, 1973 Session; App. D, *infra*, p. 1d.

Like most other Omaha banks, Petitioner took prompt advantage of the liberalized branch banking law to move into new marketing areas from which previously it had been excluded. It closed the "Cupcake" branch (which of necessity had been located in downtown Omaha, because of the 2600 foot limitation in the prior law), and opened two new branches in suburban Omaha, one within three miles of the main bank and the other at a greater distance but within the city limits.

The parties have agreed from the inception of this case that both of Petitioner's new suburban facilities were branch banks. Notwithstanding Respondents' assertions to the contrary, therefore, the only issue in this case is whether Petitioner's 18th and Douglas facility is a branch. Petitioner's size, and the competitive effect of its new branches in suburban Omaha, are completely irrelevant.

Further, it should be noted that the 1973 amendment made absolutely no change in the statutory definition of an attached facility. Cf. App. C, p. 1c, and App. D, p. 1d. During the many years that the Brandeis facility was in operation while Petitioner's main bank was in its former location in the Omaha Building, the Brandeis

facility was never challenged as an illegal branch under the prior law. Petitioner's new main bank in Woodmen Tower and its new walk-in/drive-in facility at 18th and Douglas are in precisely the same geographical relationship. The 1973 Nebraska law defining an attached facility is precisely the same as the prior law.

It should also be pointed out that the net effect of the changes in Petitioner's downtown banking facilities from 1969 to the present has been to decrease, rather than increase, both their number and the geographic region occupied by them. Prior to 1973, Petitioner had one more office in downtown Omaha than it has now, and its offices were dispersed over a three or four block area, whereas now they are across the street from each other. Petitioner's new competitive presence in suburban Omaha, which is really the gravamen of Respondents' complaint in this case, occurs only as a result of the new opportunities presented by the 1973 amendments to the Nebraska branch banking law. It is the clearly predictable and intended result of those amendments. Identical opportunities were, and are, available to Respondents and all other banks in Nebraska.

Placed in the context of the foregoing facts, all of which are uncontroverted in the record, Respondents' attempts to distinguish the case at bar and the *Farmers & Merchants* case are deceptive and of no probative value whatsoever.

Respondents' argument that the Court of Appeals referred to Nebraska law in "applying" the federal definition of a branch bank but not in "determining" the federal definition, is merely a meaningless exercise in verbal

gymnastics. A careful reading of the majority opinion renders it clear that its practical effect is to utilize state law definitions to redefine the term "branch", which is in direct contravention of this Court's holding in the *Dickinson* case.

The foregoing context also helps to explain Respondents' misunderstanding of the meaning and application of the doctrine of competitive equality, as announced by this Court in the *Walker Bank* case, which error was embraced by the Court of Appeals in its majority opinion.

To resolve the conflict between the Fourth and Eighth Circuit Courts of Appeals, and to correct the Court of Appeals' misinterpretation and misapplication of this Court's decisions in the *Dickinson* and *Walker Bank* cases, a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX C

8-157. Branch banks prohibited; auxiliary teller offices authorized; clearing house transactions not prohibited. (1) No bank shall maintain any branch bank and, except as provided in subsection (2) of this section, the general business of every bank shall be transacted at the place of business specified in its charter.

(2) With the approval of the director, (a) any bank may maintain an attached auxiliary teller office, and (b) any bank may, or two or more such banks may jointly, establish and maintain not more than one detached auxiliary teller office, to be used as a motor vehicle and walk-up off-street banking facility, such office to be within the same corporate limits and within two thousand six hundred feet of the premises specified as its place of business in its charter, but not within three hundred feet of another nonparticipating bank or within fifty feet of another auxiliary teller office. The services of such auxiliary teller office whether attached to or detached from the bank shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank.

(3) Nothing in this section shall prohibit ordinary clearing house transactions between banks.

Source: Laws 1927, c. 33, § 1, p. 153; C. S. 1929, § 8-1,118; R. S. 1943, § 8-1,105; Laws 1959, c. 17, § 1, p. 141; R. R. S. 1943, § 8-1,105; Laws 1963, c. 29, § 57, p. 158.

APPENDIX D

LEGISLATIVE BILL 312

Passed over the Governor's veto May 17, 1973

AN ACT to amend section 8-157, Reissue Revised Statutes of Nebraska, 1943, relating to banks; to permit not more than two detached auxiliary teller offices as prescribed; and to repeal the original section.

Be it enacted by the people of the State of Nebraska.

Section 1. That section 8-157, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

8-157. (1) No bank shall maintain any branch bank and, except as provided in subsection (2) of this section, the general business of every bank shall be transacted at the place of business specified in its charter.

(2) With the approval of the director, (a) any bank may maintain an attached auxiliary teller office, and (b) any bank may (, or two or more such banks may jointly,) establish and maintain not more than (one) *two* detached auxiliary teller (office) *offices,* to be used as a motor vehicle and walkup off-street banking (facility) *facilities,* such (office) *offices* to be within the (same) corporate limits (and) *of the city in which such bank is located. Any bank that establishes and maintains two auxiliary teller offices shall locate one of such offices* within (two thousand six hundred feet) *three miles* of the premises specified as its place of business in its charter. *Neither shall be located* (, but not) within three hundred feet of another nonparticipating bank or within

fifty feet of another auxiliary teller office. The services of such auxiliary teller (office) *offices* whether attached to or detached from the bank shall be limited to receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank.

(3) Nothing in this section shall prohibit ordinary clearing house transactions between banks.

Sec. 2. That original section 8-157, Reissue Revised Statutes of Nebraska, 1943, is repealed.

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* Printers Note: Bracketed words were lined through in original Legislative Bill.

Filed May 24, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

SUPPLEMENTAL MEMORANDUM OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I N D E X

CONSTITUTION CITED

CASES CITED

QUESTION TREATED

The Court has requested that Respondents comment on the applicability of the enactment of Legislative Bill 763, Eighty-Fourth Legislature, Second Session, State of Nebraska, to the matter presently under consideration.

If L.B. 763 were a valid enactment of law, the issues presented would be moot; however, the law is void as having been enacted in contravention of the requirements of the Nebraska Constitution and is thus of no force and effect.

LEGISLATIVE FACTS

Art. III, Sec. 14, of the Nebraska Constitution reads as follows, in pertinent part:

> Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member, and the bill and all amendments thereto shall be printed and read at large before the vote is taken upon its final passage. No such vote upon the final passage of any bill shall be taken, however, until five legislative days after its introduction nor until it has been on file for final reading and passage for at least one legislative day. No bill shall contain more than one subject, and the same shall be clearly expressed in the title.

The specific question is whether the passage of L.B. 763 violated the requirement that no bill shall be passed until five legislative days after its introduction.

The facts and circumstances surrounding the enactment of L.B. 763 are as follows:

L.B. 763 was first introduced on the floor of the Legislature on the sixth legislative day, January 14, 1976. The bill as introduced related only to the ability of state chartered building and loan associations to have the same powers as federally chartered savings and loan associations. (See Appendix A, infra.)

A public hearing was had on the language of that bill on January 27, 1976, before the Banking Commerce and Insurance Committee. The bill was then placed on general file on the twentieth legislative day, February 3, 1976 with a proposed amendment which would have delegated to the Director of Banking the power to make rules granting state building and loan associations the same power as federal savings and loan associations. (See Appendix B, infra.)

On the thirty-sixth legislative day, February 26, 1976, the Legislature rejected the amendment proposed by the committee. On the thirty-eighth legislative day, March 1, 1976, the bill was placed on Select File at which time Senator Schmidt obtained consent to print the amendment found in Appendix C, infra. Thus, for the first time, on March 1, 1976, language relating to commercial bank branching was introduced into the bill.

On the next day, March 2, 1976, the thirty-ninth legislative day, Senator Schmidt renewed his amendment; it was adopted, and the bill was advanced for engrossment. On that same day, Senator Schmidt obtained consent to expedite the bill and the bill as amended was adopted. (See Appendix D, infra.)

Not only was the body of L.B. 763 substantially amended, the title was substantially amended. When L.B. 763 was originally introduced, the title read as follows:

> A bill for an act to amend Sec. 8-355, Rev. Stat. Supp., 1975, relating to building and loan associations; to provide the same advantages as federal savings and loan associations; and to repeal the original section.

As finally passed, the title of L.B. 763 read as follows:

> A bill for an act relating to financial institutions; to provide what shall constitute an attached auxiliary teller office; to provide rights, powers, privileges, benefits, and immunities of state building and loan associations; to amend sections 8-157 and 8-355, Revised Statutes Supplement, 1975; and to repeal the original sections.

The title of an act is amendable in the same way, and under the same strictures, as the body of the bill. One case has held that a material change in the title of a bill after it has passed the legislature and before its presentation to the governor, renders the act unconstitutional. Weiss vs. Ashley, 59 Neb. 494, 81 N.W. 318 (1900).

Thus L.B. 763 was passed two days after introduction of the amendment relating to auxiliary teller offices of commercial banks under a title which treated two subjects one of which was unrelated to the original bill.

APPLICABLE LAW

It will be helpful to keep in mind that many of the cases, both in Nebraska and elsewhere, speak in terms of a bill being

read three times on separate days before it can be validly passed. That is the procedure in most states and was the procedure in Nebraska prior to the advent of the one house legislature. Art. III, Sec. 14 quoted above, read as follows:

> Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto, shall be printed before the vote is taken upon its final passage.

With the advent of the Unicameral, this procedure obviously had to be changed. The new constitutional section replaced the three-reading rule with a five-day rule.

Though a bill may be amended during the course of its enactment, the amendment must be "germane" to the original bill. "Germane" is defined in Nebraska as "akin", "closely allied", "pertaining to", or "related to". Wayne County vs. Steele, 121 Neb. 438, 237 N.W. 288 (1931). When an entirely new bill is substituted by amendment, the changes by way of amendment must be "strictly germane" to the original bill. In State v. Cox, 105 Neb. 75, 178 N.W. 913, the Nebraska Supreme Court stated:

> The method of substituting an entire new bill by amendment, when the changes by way of amendment are strictly germane to the original, is not unconstitutional, is in accord with universal legislative procedure, and it is unnecessary that a bill, which has been read the first and second time before such amendment, shall be again placed on first and second reading before passage. [emphasis added]

Stated another way, Gypsum Company vs. State Department of Revenue, 110 N.W. 2d 698 (Mich. 1961), held the test of

germaneness is whether the change represents an amendment or extension of the basic purpose of the original, or is an introduction of entirely new and different subject matter.

Thus, under Nebraska law the vital question in regard to the amendment of the title or the body of a bill, or both, is whether the changes made are "germane" to the original bill.

L.B. 763 started out to be a bill solely concerned with building and loan associations. The title was later changed, along with the body of the bill, to encompass a part of the commercial banking law. It should be noted that commercial banks and building and loan associations have different substantive statutory rules, that these rules are found in different sections of Chapter 8 of the Nebraska Statutes, and that the rules and regulations concerning commercial banks and building and loan associations are distinct and materially different. The precise question then becomes: Was the introduction of a section relating to commercial banking germane to the original bill concerning building and loan associations? In other words, was the amendment a constitutional change in the bill or an unconstitutional transmogrification?

No Nebraska case directly on a point has been found. However, cases which are on point from other jurisdictions establish that the legislature engaged in an unconstitutional transmogrification.

In Giebelhausen vs. Daley, 407 Ill. 25, 95 N.E. 2d 84 (1950), quoting at length from published opinion, the Illinois Supreme Court stated as follows:

> Sec. 13 of Article IV, of the constitution, provides that every bill shall be read at large on three different days in each House. And it is the contention of appellant that under the facts above this constitutional provision was not observed, and consequently the appropriation bill is invalid. This provision is clear and concise, - "every bill shall be read at large on three different days, in each house;" and it has been held by this court that a failure to observe this constitutional requirement shall render the bill void.
>
> However, amendments germane to the subject matter may be made without the proposed act, as amended, being read three times in each House. In order to come within the rules an amendment need not be read three times in each House, it must be germane to the general subject of the bill as originally introduced.
>
> The term germane, is defined***in the following language: "Literally, 'germane' means 'akin,' 'closely allied.' It is only applicable to persons who are united to each other by the common tie of blood or marriage. When applied to inanimate things, it is, of course used in a metaphorical sense, but still the ideal of a common tie is always present. Thus, when properly applied to a legislative provision, the common tie is found in the tendency of the provision to promote the object and purpose of the act to which it belongs.
>
> While it is true that the title of a bill has been held not to be an essential part of it, it is a part of the law when enacted. It is in order, therefore, to examine the language of the original bill to ascertain whether the one finally adopted is the original bill, properly amended, or a substituted bill, dealing with a new subject matter.
>
> The original bill was to appropriate money for refunds to taxpayers, in accordance with a certain provision of the Motor Fuel Tax Act (Ill. Rev. Stat. 1947, Chap. 120, par. 429,) which authorized refunds in certain cases. After this bill had been adopted in the Senate, after three separate readings, every word of the original bill was stricken,

except the number thereof, "687," and the first words, "A Bill," and then there was added to this number and the words "A Bill" new language, which provided for the salaries and expenses to be paid by the Revenue Department in the Property Division, to be incurred under the amendment to the Revenue Act. This is claimed by the Attorney General to be an amendment, and is said to be germane to the original bill.

The object of the constitutional provision is to keep the members of the General Assembly advised of the contents of the bills it is proposed to enact into law, by calling them specifically to their attention three several times, on three different days. For this court to hold a new bill, which bears no similarity to that originally introduced, except only the appropriation for a different purpose, is germane to the original, would render this clause of the constitution nugatory by construction, and invite disregard of its salutary provision.

We think there is a complete substitution of a new bill under the original number, dealing with a subject which was not akin or closely allied to the original bill, and which was not read three times in each House, after it had been so altered, in clear violation of Sec. 13 of Article IV of the constitution. [Citations omitted; emphasis in original]

The Giebelhausen case clearly stands for the proposition that a new bill cannot be substituted for an old bill when the new material is not germane. An addition of new material concerning commercial banking to a bill concerning building and loan associations, is an unconstitutional attempt to evade the strictures of Art. III, Sec. 14, Nebr. Const.

The Giebelhausen case emphasized that the two subjects must be "akin" or "closely allied". This corresponds to the definitions used in the Wayne County case, supra. Building and loan associations and commercial banks are not akin or closely allied. As mentioned previously, each is chartered under different statutes for different purposes, each has different substantive rules and procedural regulations; each has different functions and goals; and, activities permitted to one are denied

to the other. The import of the Giebelhausen case is obvious: when two subjects neither akin or closely allied are fused together, a new bill results. And when a new bill results, it must follow the legislative procedures required of any other new bill; anything less creates a constitutionally infirm and void law.

At the time of State vs. Nashville Baseball Club, 159 S.W. 1151 (Tenn. 1913), Tennessee had a constitutional provision stating that every bill had to be read once on three different days in each legislative chamber before passage. The court stated, quoting at length from the published opinion:

> The journals of the House and Senate show that a bill to prevent baseball playing on the Sabbath was introduced in the House, passed two readings, and was referred to a committee. There was some delay about the report on the bill from the committee, and a like bill was introduced in the Senate, entitled "an act to prevent baseball playing on the Sabbath."
>
> The bill introduced in the Senate passed two readings, but when called up on the third reading an amendment to the bill was adopted to the effect that after the word "baseball" therein, there should be added the words "cricket or any other game that is played with a ball, bat or club." Following this addition and amendment, the caption read:
>
> > An act to prevent the playing of the games of basketball, cricket or any other game that is played with ball, bat or club on the Sabbath, and to prescribe the punishment therefor.
>
> In the body of the bill thus amended the playing, not only of baseball, but of cricket and other games played with ball, bat, or club, was made unlawful on the Sabbath.
>
> After the bill was so amended in the Senate, it passed another reading and was then sent to the House, where, giving the action there had the construction most favorable to the validity of the act, this Senate bill was substituted for the House bill and passed the House.

The foregoing was the manner in which Chapter 147 of the Acts of 1885 came into our statute books. It is said that this act was not passed on three readings on three days in either the House or Senate, as the Constitution requires.***

As introduced in the Senate, the bill only prohibited the playing of baseball on the Sabbath day. In this form it passed two readings. Before passing its third reading, however, it was amended so as to prohibit on the Sabbath day, not only the playing of baseball, but cricket and all other games played with ball, bat, or club. Obviously such an amendment could not have been properly introduced on the original caption of the bill, and the caption was likewise amended, so as to cover an enactment, not only against baseball, but cricket and all other games played with ball, bat or club.

Baseball is a game entirely distinct from cricket, and entirely distinct from many other games played with ball, bat or club. Legislation respecting baseball would not have covered these other games. So when the baseball bill was amended, so as to include the other games, it became entirely a new bill. It was a baseball bill no longer.

This fact was evidently recognized by the Senators, when they made a change in the caption of the bill to cover the new matters added thereto. Whenever the caption of a bill is materially changed, the bill becomes a new one. There may be additions to the caption of matters, germane and explanatory, by way of making the title more definite, which will not change the identity of the bill. If, however, there is added to the caption entirely new and foreign matter, the caption and the bill will lose their identity.

When the caption is thus radically changed, and the bill thus becomes a new one, it must pass three readings after it is so changed in order to become a valid constitutional enactment.

This question has been fully considered by this court, and our conclusions have been expressed, in Erwin vs. State, 116 Tenn. 71, 93 S.W. 73, by the present Chief Justice, as follows:

> Every bill has two parts, the title and the body. The title must contain the

subject of the proposed legislation and that subject must be single. This was intended to serve a two-fold purpose. The subject must be expressed in the title, so that the members of the Legislature have their attention drawn directly to the matter about which they are to concern themselves in the discharge of their legislative duties. A second purpose is that the people of the state may know what their representatives are doing and may interpose if they choose by petition or remonstrance. The title must be single, to prevent omnibus legislation and log rolling.

It is obvious that to serve these purposes, the title must be a constant quantity, not subject to amendment, or at least not subject to any alteration that will affect any substantial change in it. It fixes the identity of the bill. There may, indeed, be made a substantial change in a title; but, if so, it becomes a new title, the caption of a new bill.

What is said in the constitutional provisions quoted concerning amendments refers to the body of the bill. This, as a matter of course, may be amended in the house in which the bill originated. The Constitution also permits amendments to be engrafted upon it in the other House. No restriction is placed upon this power of amendment, further than results from the rigidity of the title and the necessity of conforming thereto, and the requirement that there shall be a concurrence of the two houses upon the whole bill. One section may be stricken out, and its place supplied by another containing a different provision. All may be stricken out, except the title and the enacting clause, and new provisions inserted quite different than those which first constituted the body of the bill; but upon this liberty there rests one unyielding limitation, one imperious requirement. Every amendment, be it great or small, must harmonize with the title, must be germane to it, must fall within its scope.

If an amendment foreign to the title be introduced one of two results must follow:

> Either the title must be so altered as to embrace it, or the bill as it stands, will be vitiated by it; but if the title be so changed the bill is no longer the same. The title is new, and the bill is radically different from the thing it was before.
>
> This bill, therefore, prohibiting the playing of baseball, cricket, and all other games with ball, bat, or club, never passed three readings in the Senate. It only passed one reading in the Senate, and was not enacted as prescribed by section 18 of article 2 of the Constitution.

The implications of the Nashville Baseball Club case for the present situation, again, are obvious. What happened in that case was almost identical to what happened in the instant case. Commercial banking activities are no more akin to building and loan activities than are baseball and cricket like each other.

Finally, Gronert vs. People, 95 Col. 508, 37 P. 2d 396 (1934) held that where the purpose of a bill, as introduced by the legislature, was to "license" and to regulate the business of making small loans at a greater rate of interest than 12% per annum, amendments changing the original purpose so as to forbid the licensing and regulating of the business of making small loans at interest rates greater than 1% of month, was an unconstitutional change of the original bill.

Just as in Gronert a bill to regulate the small loan business could not be converted into one which in effect prohibited such a business, neither can a bill dealing with the general powers of building and loan associations be changed into one which controls the branching activities of commercial banks.

The five-day rule is designed to let the people of Nebraska know what their representatives are doing and enable them to resist a legislative effort if they so choose. To allow a bill dealing with one topic to be converted into one which deals with another topic, frustrates that purpose.

The title of a bill must contain the subject of the proposed legislation which subject must be single. In the absence of such a requirement, a legislator's attention would not be drawn directly to the matter about which he is to concern himself.

What was done in the case of L.B. 763 deprived the citizens of Nebraska the opportunity to be heard and to explain the philosophy behind limiting branching powers. It gave no opportunity to explore the economic impact the enactment would have upon the banking community and upon the citizens of the state.

The bill was simply the result of the raw exercise of power by the state's largest bank so as to convert its illegal activity into a lawful one. The power was exercised with reckless indifference to the constitutional safeguards provided the citizens of the State of Nebraska; and, as such, the legislation is invalid.

CONCLUSION

Though respondents cannot in good conscience argue that the issues presented by the within appeal are moot, the Petition for Writ of Certiorari to the United States Court

of Appeals for the Eighth Circuit should be denied for the reasons stated in Respondents' brief, heretofore filed.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1382

THE OMAHA NATIONAL BANK,

Petitioner,

vs.

NEBRASKANS FOR INDEPENDENT BANKING, INC., et al.,

Respondents.

PETITIONER'S MEMORANDUM ANSWER TO SUPPLEMENTAL MEMORANDUM OF RESPONDENTS

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INTRODUCTION

This Memorandum is submitted in answer to the Supplemental Memorandum of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (hereafter called "Supplemental Memorandum"). Petitioner is informed that Respondents' Supplemental Memorandum was filed in response to a request by the Court, on May 21, 1976, that Respondents file with the Court a statement of their position with regard to the effect of the passage by the Nebraska Legislature of LB 763, subsequent to the decision of the Court of Appeals in this case.

Believing that the Court cannot and need not address the merits of the issue of the constitutionality or validity of LB 763, and surmising that the Court is concerned about the possibility of mootness by virtue of the passage of LB 763, counsel for Petitioner will not discuss the validity of LB 763, but will limit the scope of this Memorandum solely to the issue of mootness.

ARGUMENT

I. THE CASE IS NOT MOOT

Although for different reasons, the parties agree that this case is not moot by virtue of the passage of LB 763. As set

forth at length in its Petition, Petitioner contends that the passage of LB 763 is irrelevant, because state law, whether it be LB 763 or its predecessor statute in effect at the time of the decision of the Court of Appeals, has no bearing on the central issue in this case, i.e., whether Petitioner's facility at 18th and Douglas Streets in Omaha is a branch bank. This court's decision in the Dickinson case requires that that issue be decided under federal law, and not state law.

Respondents contend in their Supplemental Memorandum that LB 763 does not render the case moot because the statute is unconstitutional or otherwise invalid. While Petitioner certainly does not concede this argument, the validity of LB 763 is immaterial, because the statute itself is wholly irrelevant to the central issue in this case.

Petitioner acknowledges that agreement between the parties that the case is not moot does not preclude the Court from finding that it is. In view of the previous decisions of the Court, however, it is respectfully submitted that the case at bar should not be found moot.

In President & Commissioners of Princess Anne, 393 U.S. 175 (1968), the Court held that although the contested ten-day injunction restraining petitioners from holding rallies or meetings had long since expired, the case was not moot. Citing Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911), and Bus Employees v. Missouri, 374 U.S. 74 (1963), the Court stated:

> ". . . The underlying question persists. . .: whether, by what process, and to what extent the authorities of local government may restrict petitioners in their rallies and public meetings." 379 U.S. 179.

By a parity of reasoning, it may be correctly stated, of the effect of LB 763 upon the instant case, that the underlying question persists: whether state law may play a dominant role in the determination of whether a facility of a national bank is or is not a branch.

As in Southern Pacific Terminal Co. v. I.C.C., supra, the question in this case is a continuing and recurring one, affecting the regulation of branching activities of national banks in every state which imposes limitations of any kind on branch banking.

Further, it cannot be said that the passage of LB 763 resolves the controversy even between the parties themselves in this case. While the statute, if applicable, might remove Respondents' objection to the location of Petitioner's facility in relation to its main bank, it does nothing to eliminate the controversy between the parties as to the nature and extent of the banking activities which may be carried out at the facility. Throughout this litigation, Petitioner has contended that the facility is an integral part of the main bank, and that all banking activities permissible at its Woodmen Tower location are likewise permissible at the 18th and Douglas location. But LB 763 would impose stringent limitations upon the activities permitted at the

18th and Douglas location, restricting Petitioner to receiving deposits, cashing checks, and receiving payments payable at the main bank. Supplemental Memorandum, App. D, p. 3.

Finally, it should be pointed out for the information of the Court, but certainly not as an argument ultimately dispositive of the question, that even if the effect of LB 763 is to render this case moot, that result could not obtain at this time, simply because the statute is not yet in effect. As pointed out in the Petition (fn. 16, pp. 13, 14), the statute will not become effective until ninety days after adjournment of the legislative session at which it was enacted. The Legislature adjourned on April 9, 1976; LB 763 will not become effective until July 10, 1976.

II. IT WOULD BE INAPPROPRIATE TO DISPOSE OF THE PETITION ON GROUNDS OF MOOTNESS

It is respectfully submitted that the interests of justice would not best be served by disposing of the Petition on grounds of mootness, for at least two reasons. First, such a disposition would not cleanly resolve the conflict between the decision of the Court of Appeals for the Fourth Circuit in Commonwealth of Virginia v. Farmers & Merchants National Bank, 480 F.Supp. 568 (W.D. Va. 1974); aff'd per curiam 515 F.2d 154 (4th Cir. 1975); cert. denied, 44 U.S.L.W. 3205 (U.S. Oct. 6, 1975), and that of the Court of Appeals for the Eighth Circuit in the case at bar. Even if the Court's disposition of this case were to grant certiorari and summarily to reverse or vacate the judgment of the Court of

Appeals on grounds of mootness, doubt would remain as to the precedential value of the Fourth Circuit's decision in the Farmers & Merchants case. The case at bar affords the Court the opportunity to resolve that conflict decisively and clearly, and to apprise the national banking industry, and the federal courts and agency which regulate it, whether or not they may continue to rely on the rules enunciated by this Court in the Dickinson and Walker Bank cases. The public interest and the ends of justice will be best served if the Court avails itself of that opportunity.

Second, a disposition of this case on grounds of mootness will deprive Petitioner of a clear definition of its legal position, to which it should be entitled at the conclusion of this protracted litigation. Such a disposition would necessarily presuppose the validity of LB 763, but probably would not adjudicate it, because there is no evidence in the record upon which to base such an adjudication. Consequently, Petitioner, after nearly three years of administrative, quasi-judicial and judicial proceedings, would find itself, on the one hand, without a decision on the merits on the issue litigated, and on the other hand, subject to further attack by Respondents or others similarly situated, based upon the alleged invalidity of LB 763. Such an outcome is manifestly unfair to Petitioner, and should be avoided in the interests of substantial justice. That Respondents are prepared and intend to mount such an attack should be evident from their strategy before this Court: although it is obviously a potentially potent argument for denial of review, Respondents made no suggestion of the

possibility of mootness in their Brief in Opposition, and when asked by the Court to comment on it, denied the possibility in their Supplemental Memorandum, thus seeking to preserve their opportunity to challenge LB 763 in subsequent, separate litigation.

III. IF THE COURT DISPOSES OF THIS CASE ON GROUNDS OF MOOTNESS, IT SHOULD GRANT CERTIORARI, REVERSE OR VACATE THE JUDGMENT OF THE COURT OF APPEALS, AND REMAND THE CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO DISMISS.

As stated in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), the established practice of this Court, in dealing with a civil case from a court in the federal system which has become moot, is to reverse or vacate the judgment below and to remand the case with a direction to dismiss it. Indeed, this has become the Court's "standard position" in such cases, subject to "but few exceptions" in recent years. Ibid., fn. 2, 340 U.S. 40.

While such a disposition of this case would be, in Petitioner's view, incomplete and indecisive, it would, at least, relieve Petitioner of the onus of the erroneous decision of the Court of Appeals. In the words of this Court:

> ". . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented by happenstance. When that procedure is followed, the rights of all parties are preserved. . ." United States v. Munsingwear, Inc., supra, 340 U.S. 40.

It is respectfully submitted that, in any event, it would be inequitable for the Court to dispose of this case on grounds of mootness, prior to the time LB 763 becomes effective on July 10, 1976. Such a disposition, prior to July 10, might oblige Petitioner to close the 18th and Douglas facility for the short period of time between the Court's decision and the effective date of LB 763, only to reopen the facility on July 10. The consequent disruption of customer convenience, customer relations, and Petitioner's operations, would be needlessly harsh and oppressive.

CONCLUSION

Although reaching their conclusions for different reasons, the parties agree that this case is not moot, and that the Court should not dispose of it on those grounds. Further, there is ample precedent in the Court's previous decisions to support a determination that the case at bar is not moot.

The central issue in this case is clearly defined, and presents the Court with an opportunity to make an adjudication which will squarely determine whether its holdings in the Dickinson and Walker Bank cases will continue to stand as authoritative guidelines for the banking industry, and the federal courts and federal agency charged with the regulation of branching activities of national banks. Such an adjudication will also cleanly resolve the otherwise irreconcilable conflict between the Fourth and Eighth

Circuits on the central issue presented in this case, and will determine whether state legislatures and administrative agencies are to have a more dominant role in the regulation of national banks than they have been accorded in the past.

For the reasons stated in its Petition, The Omaha National Bank respectfully urges the Court that the only appropriate disposition of this case is to grant certiorari and to reverse the decision of the Court of Appeals on the merits. Petitioner believes that the judgment of the Court of Appeals is so patently in conflict with this Court's holding in the Dickinson case that reversal on the merits could properly be adjudicated in a summary manner, without the submission of further briefs and the hearing of oral argument.

To dispose of the case on grounds of mootness would be to deprive Petitioner of the clear determination of its legal position, to which it should be entitled at the conclusion of this protracted litigation; to leave Petitioner in an ambiguous position in the probable event of future litigation challenging the validity of LB 703; to leave undispelled the cloud of doubt with which the Court of Appeals has surrounded this Court's decisions in the Dickinson and Walker Bank cases; and to leave wholly unresolved the squarely conflicting rationales of the Court of Appeals in this case and the Court of Appeals for the Fourth Circuit in the Farmers & Merchants case.

If, however, the Court decides to dispose of this case on grounds of mootness, it is clear from its prior decisions that the proper method of disposition is to grant certiorari, to summarily reverse or vacate the judgment of the Court of Appeals, and to direct the trial court to dismiss the case.

Respectfully submitted,

ORIGINAL SIGNED BY
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